

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

438

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,134

STATES MARINE LINES, INC.,
GLOBAL BULK TRANSPORT CORPORATION,

Petitioners,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,

Respondents,

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN,
JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE,

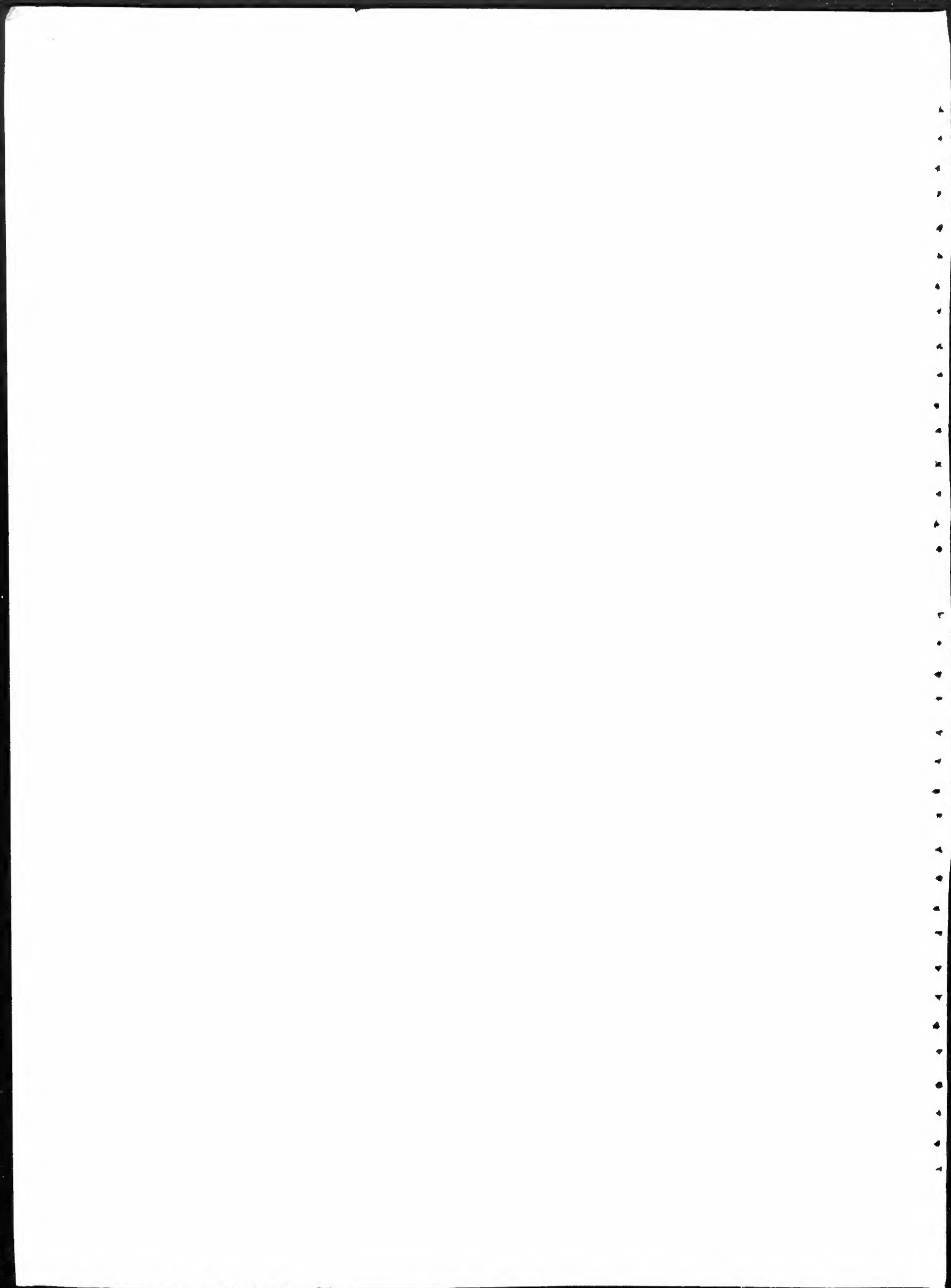
Intervenors.

Petition to Review an Order of the
Federal Maritime Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 10 1966

Nathan J. Paulson
Clerk



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JOINT APPENDIX

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JOINT APPENDIX

In the Matter of:

AGREEMENT NO. 150-21,
TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN AND AGREEMENT NO. 30103-17,
JAPAN ATLANTIC & GULF FREIGHT
CONFERENCE

DOCKET NO.

1095

[FEDERAL REGISTER -
Pages 2699-2700
March 19, 1963]

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AND JAPAN-ATLANTIC & GULF FREIGHT CONFERENCE

Hearing on Protest of Approval

Agreement No. 150-21 is a modification to the basic agreement of the Trans-Pacific Freight Conference, which has been filed for approval under section 15, Shipping Act, 1916. The modification seeks to strengthen the "neutral body" system presently employed by the Trans-Pacific Freight Conference to police the obligations of its members under the basic agreement.

States Marine Lines and Isthmian Lines, Inc., parties to Agreement No. 150, the basic agreement, have protested approval of the modification on several grounds.

Agreement No. 3103-17 is a modification to the basic agreement of the Japan-Atlantic & Gulf Freight Conference which has been filed for approval under section 15, Shipping Act, 1916. The modification, identical in its terms with Agreement No. 150-21, seeks to strengthen the "neutral body" system presently employed by the Japan-Atlantic & Gulf Freight Conference to police the obligations of the members under the basic agreement.

States Marine Lines, a party to Agreement No. 3103 has protested approval on the same grounds as the protest to approval of Agreement No. 150-21.

The grounds of the protests against approval of Agreement No. 150-21 and Agreement 3103-17 (the Agreements) are as follows:

1. The Agreements were defectively executed in that States Marine and Isthmian did not sign or agree to the modifications, and thus cannot be bound thereby.

2. Inconsistency between Articles 10 and 25 which define those malpractices subject to arbitration and those subject to the jurisdiction of the Neutral Body respectively.

3. Non-neutrality of the Neutral Body under the terms of the modification.

4. Vagueness of Neutral Body's jurisdiction.

5. The imposition of a fine for the failure of a conference member to report suspected malpractices of other members.

6. The unlimited investigatory power vested in the Neutral Body.

7. The failure to impose a statute of limitations on the investigations of the Neutral Body.

8. The failure to apprise the accused of the identity of his accuser.

9. The lack of procedural safeguards for the accused in Neutral Body proceedings.

10. The failure to apprise an accused of the disposition of complaints other than those in which a violation was found.

11. The lack of any rights of appeal on the part of an accused.

The protests do not raise any disputed issues of fact requiring an evidentiary hearing.

Therefore, it is ordered, That a proceeding into the matter of approval of Agreement No. 150-21 and Agreement No. 3103-17 is hereby instituted. Said proceeding shall be limited to the submission of affidavits and memoranda, replies thereto and oral argument. The affidavits of fact and memoranda of law shall be filed no later than close of business April 10, 1963, replies thereto shall be filed no later than close of business April 17, 1963. An original and 15 copies of such affidavits of fact and memoranda of law, and replies thereto, are required, and must be addressed to the Secretary, Federal Maritime Commission, Washington 25, D. C. Copies of any papers filed with the Secretary should also be addressed to counsel for the Conferences named herein and for States Marine Lines. Oral argument will be held on May 1, 1963, at a place and time to be announced later. The Commission is particularly interested in receiving argument on the following question:

Does section 15, Shipping Act, 1916, require that modifications to agreements approved thereunder be adopted only upon unanimous vote of the parties to such approved agreements?

It is further ordered, That the Trans-Pacific Freight Conference, and the Japan-Atlantic and Gulf Freight Conference and their respective members as indicated in Appendix A and Appendix B attached hereto are hereby made respondents in this proceeding.

It is further ordered, That action with respect to Agreement 150-21 and Agreement 3103-17 be held in abeyance pending the Commission's decision and order in this proceeding.

It is further ordered, That notice of this order and notice of hearing be published in the FEDERAL REGISTER, and a copy of such order and notice of hearing be served upon respondents, the Trans-Pacific Freight Conference and the Japan-Atlantic & Gulf Freight Conference and their member lines.

All persons (including individuals, corporations, associations, firms, partnerships, and public bodies) having an interest in this proceeding and desiring to intervene therein, should notify the Secretary of the Commission promptly and file petitions for leave to intervene in accordance with Rule 5(n) (46 CFR § 201.74) of said rules.

By order of the Federal Maritime Commission March 12, 1963.

THOMAS LISI,
Secretary

ORAL ARGUMENT

1 Before The Federal Maritime Commission

In the Matter of:

AGREEMENT NO. 150-21, TRANS-PACIFIC FREIGHT
CONFERENCE OF JAPAN AND AGREEMENT NO.
3103-17, JAPAN ATLANTIC & GULF FREIGHT
CONFERENCE

DOCKET NO.
1095

Room 114, Centennial Building,
1321 H Street, N. W.,
Washington, D. C.,
Wednesday, May 1, 1963

Met, pursuant to notice, at 9:30 o'clock a.m.

2

* * * * *

PROCEEDINGS

CHAIRMAN STAKEM: Come to order, please.

The Commission has scheduled at this time oral argument in Docket 1095, Agreement No. 150-21, Trans-Pacific Conference of Japan, and Agreement No. 3103-17, Japan-Atlantic & Gulf Freight Conference.

Now, the notice of oral argument, served on March 14, 1963, cited 11 grounds of protest against approval of Agreement 150-21 and Agreement 3103-17.

In our notice, we stated that we were particularly interested in receiving argument on the following question: Does Section 15 of the

Shipping Act of 1916 require that modifications to agreements approved thereunder be adopted only upon the unanimous vote of the parties to such approved agreement?

Affidavits of fact and memoranda of law were required to be filed by the close of business April 17, 1963, with replies to be filed by close of business April 24, 1963.

* * * * *

5 ORAL ARGUMENT BY CHARLES F. WARREN, ON BEHALF
OF TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
AND JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

MR. WARREN: * * *

16 Now, certainly we do not believe that the present voting rule, which is a two-thirds voting rule, could be cancelled, altered, or modified, or disapproved in this proceeding, for the same reason that I have been discussing before. The fact is that the Commission must have the opportunity to examine the workability of a two-thirds rule. It has no evidence before it on this point. It cannot in the abstract state that a two-thirds rule is contrary to the Shipping Act. It must be based upon an evidentiary record before that determination can be made.

* * * * *

17 But, again, I say that the Commission cannot change our voting procedures unless we are afforded the opportunity to show to the Commission the importance of these procedures and why they are necessary for operation.

* * * * *

[Served October 30, 1963, F.M.C.]

* * * * *

1. Section 15 does not require, in the absence of a provision in the basic agreement to the contrary, that modification strengthening self-policing system of conference be adopted only upon unanimous vote of the parties to such approved agreements.

2. Agreement No. 150-21 and Agreement No. 3103-17, approved pursuant to Section 15, Shipping Act, 1916.

* * * * *

REPORT

BY THE COMMISSION (John Harllee, Chairman, Ashton C. Barrett, James V. Day, Thos. E. Stakem, Commissioners):

This proceeding was instituted to hear protests against the approval under section 15, Shipping Act, 1916, of certain proposed modifications of two existing conference agreements. Agreement No. 150-21 is a proposed modification of the basic agreement of the respondent Trans-Pacific Freight Conference of Japan which seeks to strengthen the 'neutral body' system presently employed by Trans-Pacific to police the obligations of its members under the basic agreement. States Marine Lines and Isthmian Lines, Inc., parties to Agreement No. 150, the basic agreement, have protested approval of the proposed modification on several grounds.

Agreement No. 3103-17 is a proposed modification of the basic agreement of the respondent Japan-Atlantic & Gulf Freight Conference which also seeks to strengthen the 'neutral body' system presently employed by Japan-Atlantic to police the obligations of its members under the basic agreement. States Marine Lines, a party to Agreement No. 3103, the basic agreement, has protested approval of this modification on the same grounds as its protest of Agreement No. 150-21.

Except for differences not relevant here both basic agreements and the proposed modifications thereto are identical in their terms and for the purposes of this report they shall be treated as one. The present self-policing systems of both respondent conferences are provided for in Article 25 of their respective basic agreements. (For the full text of present article 25 see Appendix A to this Report.)

Under their present systems, respondents select and appoint a neutral body from responsible accountants or other persons, but the person appointed may not be employed by nor financially interested in any party to the basic agreement. Once appointed, the neutral body is empowered to receive and investigate complaints in writing from members of the conference, and to engage agents, lawyers and other experts and receive evidence from members in the conduct of such investigations. In turn, the conference members are obligated to cooperate with the neutral

body in the course of its investigations and must make available to it all records, correspondence and documents of every kind wherever located. When its investigation is completed, the neutral body has the sole discretion to determine whether or not there has been an infringement of the basic agreement and the conference has no right to question its decision. If an infringement is found, the neutral body fixes the amount of the fine^{1/} and reports, to the extent it deems appropriate, the results of its investigation to an "Ethics Committee." The Ethics Committee, composed of the conference chairman and three members selected by him, then informs the member lines through the chairman.

Under the proposed modifications the powers of the neutral body are somewhat enlarged and the procedures by which it conducts its investigations are set forth in greater detail. (The full text of the proposed modifications appears in Appendix B to this report.)

Under the proposed system a person would not be disqualified to act as the neutral body by virtue of employment by or interest in a party to the basic agreement if, prior to appointment, the person selected divulges such interest and the conference appoints him with knowledge thereof. The neutral body, in addition to investigating written complaints of "malpractices," would be empowered to institute such investigations on its own motion. "Malpractice" is defined in the proposed modification as "any direct or indirect favor or benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer or other cargo interests or any of their agents, or any other act or practice resulting in unfair competitive advantage over other members." While under the present Article 25 the member lines are obligated to make available all books, records, etc., the proposed modifications affirmatively grant the neutral body right of access to the books, records, etc. of the members "immediately and without

^{1/} The maximum fines are specified in Article 25 as \$10,000 for the first offense; \$15,000 for the second offense; \$20,000 for the third offense, and \$30,000 for the fourth and subsequent offenses. These maxima are unchanged under the proposed modification.

prior screening by the member or its agents." In addition, the failure of a member to supply materials and cooperate with the neutral body in its investigations would constitute a breach of the basic agreement. Procedures to be followed by the neutral body in granting a "hearing for respondent" are set forth in the proposed modifications, and "the respondent is granted an opportunity to appear before the neutral body with his accountants or counsel or both and offer such explanations as he may have." The present Article 25 is silent as to any right of the respondent to a hearing.

The foregoing represent the major changes respondents seek to make in their present systems. There are other differences but these are primarily differences in language only and will be discussed only if and where germane to issues raised by the protests.

In addition to protesting specific provisions of the proposed modifications on their merits States Marine and Isthmian in their original protests contend that the modifications are invalid under section 15 because they were not adopted by unanimous vote. In our order instituting this proceeding we expressed our particular interest in receiving argument on the question of whether section 15 of the Shipping Act requires such unanimity. Respondents did not file any memorandum directed to the merits in this proceeding, taking the position in a motion to dismiss that a full evidentiary hearing was required before the Commission could disapprove an agreement under section 15. Memoranda, directed solely to the unanimity issue, were filed by States Marine; by A. P. Moller-Maersk Line, as intervener; and by Hearing Counsel. States Marine, of course, takes the position that unanimity is required while Hearing Counsel takes the opposing position. Moller-Maersk contends that the question is not susceptible of an unqualified answer but requires an ad hoc determination based upon specific modifications.

Section 15 provides in part:

"That every common carrier by water. . . shall file immediately with the Commission . . . every agreement with

another such carrier . . . to which it may be a party or conform in whole or in part."

From the above quoted provision of section 15, States Marine argues that because it voted against the proposed modifications they are not agreements to which it is party or to which it conforms in whole or in part and thus they are not proper agreements under section 15.

Articles 18 and 19 of respondents' basic agreements set forth the voting procedure and requirements by which the respondents conduct their operations as conferences in our foreign commerce. Pursuant to Article 18, three-fourths of all parties entitled to vote constitute a quorum, except when changes in the basic agreement are being considered, when it requires four-fifths of those parties entitled to vote to make a quorum. Article 19(a) provides that once the four-fifths quorum is present, all parties agree to be bound by changes to the basic agreement made with the consent of two-thirds of all parties entitled to vote. Articles 18 and 19 were a part of the basic agreement when States Marine was admitted to membership.

States Marine contends that notwithstanding the language of Articles 18 and 19, a modification of the basic agreement without unanimous consent of the parties alters the contractual relations of the dissentient parties contrary to the principles of contract law and is thus invalid. States Marine argues, in an attempt to avoid its obligations under Articles 18 and 19, that because it was not among the original organizers of the respective conferences and had no part in the formulation of their basic agreements it remains free to attack those portions of the agreements which it considers improper. For States Marine to prevail, some provision of section 15 must render the voting requirements of Articles 18 and 19 invalid, for if they are valid States Marine as a subscriber to the agreement is bound thereby.

In attempting to show that the voting requirements are invalid States Marine attempts to draw analogies from the field of private contract law. We think these analogies improper. Private contracts, normally between

two parties, cannot reasonably be equated with agreements approved under section 15. An agreement providing for the organization of a conference to operate in our foreign commerce is of necessary an agreement which attempts to reconcile a number of divergent interests insofar as is consistent with Congressional policy and the public interest in the free flow of our foreign commerce. Such an agreement must provide for the continuing commercial operations of a relatively large number of conference members with as little friction and obstruction as possible. The very heart of such an agreement is that each individual line relinquishes some of its freedom of action, in exchange for the benefits resulting from participation in the conference arrangement.^{2/}

This concept of majority rule is not uncommon in the ocean freight industry. A good many agreements on file with the Commission provide for the modification thereof by a stated majority. We do not consider it unreasonable for a conference to make such a provision in its basic agreement, provided it is not applied so as to contravene the standards of section 15. We find nothing in the concept of majority rule as applied to the proposed modifications here under consideration which renders it discriminatory as between carriers or shippers, detrimental to the commerce of the United States, contrary to the public interest or otherwise contrary to the requirements of section 15. States Marine in accepting membership in the respondent conferences has bound itself to the terms of the basic agreement, and so long as it chooses to remain a member it must conform to all modifications thereto which are regularly made and duly approved by the Commission.

^{2/} This is by no means a novel relationship. Analogous situations pervade our political, economic and social structure. Just one example in the economic sphere is found in corporate organizations. A corporation can make fundamental changes in its charter, changing the very nature of the corporate business, and most states require only that the consent of two-thirds or three-fourths of the stockholders be given to this change. The dissenting stockholder must either bow to the will of the majority, or sell his stock. The latter alternative is, in effect, resignation from the corporation.

Both States Marine and Isthmian object to the conferences' system of recording affirmative action on proposed modifications when they are filed with the Commission for approval under section 15. When the required majority has voted to amend the conference agreement, the approved amendment is subscribed in the following standard form:

"In witness whereof the Trans-Pacific Freight Conference of Japan [or the Japan-Atlantic & Gulf Freight Conference] the members of which are all hereinafter listed, has authorized the foregoing amendments by resolution passed at its Regular Conference Meeting held [date] in [place]."

This is followed by an alphabetical listing of all the members of the conference, including those who had voted against the proposal, and then by the signature of the conference chairman, who signs on behalf of all its members.

Protestants claim that the signature of the conference chairman on behalf of the entire membership falsely implies that the modification was carried unanimously.

We agree. The method used by respondents is misleading at best, and we are of the view that the respondents should adopt a signature form which removes any possibility of a false impression as to the unanimity of an action when in fact unanimity does not exist.

Protestants also challenge several of the substantive features of the proposed modifications. Basically they object to the following:

1. The provision allowing the neutral body to have an "interest" in a party to the basic agreement so long as that interest is divulged prior to appointment.
2. The asserted vagueness of the neutral body's jurisdiction under the proposed modification.
3. The provision making the failure of a member to report a suspected malpractice a breach of the basic agreement.
4. The unlimited investigatory power of the neutral body and the absence of a statute of limitations.

5. The failure to apprise the accused of the identity of his accuser and the lack of procedural safeguards.
6. The failure to inform the accused of the disposition of complaints other than those in which a violation is found.

In a recent amendment to section 15, Congress expressed its concern over past failures of steamship conferences operating in our foreign commerce to live up to the terms of their agreements when it directed this Commission to disapprove any agreement upon a finding of inadequate policing of the obligations under it.^{3/} Congress, however, left to the individual conferences the responsibility of selecting the method best suited for their particular trade and situation. In furtherance of this intent of Congress we have adopted a broad policy respecting self-policing systems of conferences operating in our foreign commerce.^{4/} While section 15 requires self-policing modifications to be approved under that section as comprising a part of the complete agreement of the parties, we are not inclined when considering approval to specify the procedures by which the parties seek to insure that each will fulfill its obligations to the others. It seems to us that the prime concern when considering whether to approve such an agreement is whether it is unjustly discriminatory as between the carriers party to it and whether it is reasonably probable that the agreement will insure adequate policing, thereby fostering the free flow of our commerce unhampered by malpractices.

The proposed modifications now before us are designed to strengthen the self-policing systems of the respondent conferences. The essence of protestants' argument against approval of these agreements is that the

^{3/} Public Law 87-346 (75 Stat. 764) amended section 15 by including inter alia the following provision: "The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it . . ."

^{4/} See statement of the Commission upon promulgation of rules governing self-policing systems, 28 F.R. 9257, August 22, 1963.

power vested in the neutral body is capable of abuse. The Commission must assume, however, that once the agreement is approved the conference will live up to its obligation to apply that agreement so that it does, in fact, adequately and without discrimination police conference obligations. We are of course under a continuing duty to maintain surveillance of these and all section 15 agreements, and should respondents fail to apply the agreements approved herein effectively and without discrimination, we shall take such steps as are necessary under the circumstances.

We have examined the proposed modifications and the protests thereto. We find nothing in the proposed modifications which warrants their disapproval under section 15. Thus we conclude that Agreements No. 150-21 and 3103-17, are not discriminatory as between the carriers party thereto nor detrimental to the commerce of the United States, contrary to the public interest, or otherwise violative of the Act, and they should be approved under section 15 of the Act.

In the light of this conclusion, we deem it unnecessary to rule on respondents' contention that we may deny approval of the modifications only after a full evidentiary hearing and respondents' motion to dismiss is hereby denied. An appropriate order will be issued.

Commissioner Patterson dissenting:

Based on the record before me in this proceeding, my conclusions are as follows:

First. I concur in the result reached in the preceding report as to the adequacy of all parts of Article 25 with the exception of sub-articles 25(a) and 25(f) proposed for approval by the Conference.

Second. I dissent from that part of the Commission's majority decision which approves sub-articles 25(a) and 25(f) of Appendix B.

As regards my dissent which is stated above as my second conclusion, I find inadequate policing of the obligations pursuant to section 15 of

the Act as a result of sub-article 25(a), paragraphs (1) and (2), which provide for the appointment of an impartial, independent person or firm as a neutral body which shall not have any "interest" in the form of any material professional or business relationships, financial interests or service contracts in a Conference member. Paragraph (2) says that in case of such an interest it shall be divulged and will not thereafter affect the qualification of the neutral body, but such interested neutral body must disqualify itself "in the event of a complaint against a member with which it may have such an interest." (Underscoring added.) The provision in paragraph (2) which requires disqualification only in the event of a complaint against a member but not by a member in which the neutral body may have an interest belies the high standards of neutrality set up in paragraph (1).

The two conditions are incompatible. The second condition in paragraph (2), if it means anything, means that the neutral body is not independent and can not in fact be impartial. The effectiveness of this cancellation of the independent and impartial standard is reinforced by a further obligation that the Conference members "will not raise an objection, based on such grounds . . ." (i.e., employment by a complaining party). The effect of these provisions is to permit the neutral body to have a commercial bias through business relationships as long as the bias does not favor the accused. If the neutral body is the regular accountant or auditor of the complaining carrier and discloses such relationship, it is qualified to pass on alleged violations, but if it is the same thing for the accused it is powerless to act. Such a provision which creates and then contradicts the expressions of independence through such a distortion of the neutrality concept of favoring neither side in a dispute, by permitting a spurious neutrality or bias in favor of an accuser and against an accused, provides inadequate policing in my view.

This inadequacy through a defiance of the rules of fair play may be thought to have been invited by the Court in Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission, U.S. Ct. App., Ninth Circuit, No. 17,975, March 6, 1963, when, in the course of an opinion holding

valid and affirming our order in Docket No. 920 and 920 (sub. 1), the court remarked whether "a further amendment eliminating this requirement of true neutrality would have ultimately been approved by the Board is something on which we are not required to speculate." In Docket No. 920 and 920 (Sub. 1), the Commission reviewed the same Conference's Article 25 before the presently proposed amendment, which simply provided for the appointment of a neutral body policing unit and stated that the neutral body "could not be a party to nor employed by nor financially interested in any party to the Agreement." Because of the facts showing that the neutral body was an agent of a regular auditor of one of the members of the Conference, the Commission said: "If the person selected was not actually neutral or impartial, then unquestionably there was a departure from that which the Board had approved and to which the conference membership had agreed." It is my opinion that the Commissioners held that the facts showed non-conformity with the terms of the contract's neutral body provisions. The presence or absence of true neutrality is still the issue, in spite of the changed language, and on this issue the inconsistent provisions fall down just as the Conference's deeds failed to measure up to the true neutrality provisions of its contract in the case before the Court. Believing true neutrality to be the proper standard, then non-neutrality in the proposed Agreement involves inadequacy as regards this norm, and it is my opinion that the Commission should make a finding of inadequacy of the revised provisions.

My dissent from approval of sub-article 25(f) is not directed at any specific provision, but to the absence of any provision putting a time limit on how far back into the past a neutral body can go in investigating complaints. To the extent of the absence of a limit, such as two years, the policing provisions are inadequate.

Ideally, the hearing procedure provided for in sub-article (f) should provide a method for determining the full truth in connection with an alleged malpractice. An adequate provision will at least provide a rudimentary method for obtaining the truth so the neutral body can make a fair decision.

If the neutral body is allowed to investigate complaints based on past occurrences where the evidence will be imprecise or non-existent, where peoples' memories will be vague and documents will have been destroyed, the opportunity for obtaining the truth and a fair hearing is lost. When this lack of safeguard for the discovery of the true facts is coupled with the other provisions of sub-articles (e) and (f), denying the accused the right to know about the evidence against him, not providing a true hearing, with witnesses, and argument, but only the right to offer explanations; giving notice of charges only "after the Neutral Body has completed its investigation and arrived at a tentative decision that there was a breach . . ." determined in secret deliberations on a secret complaint of an unknown complainant, the absence of any provision to prevent stale complaints compels disapproval.

Unless Article 25 is further modified to prevent complaints based on events that occurred before the neutral body system is approved by the Commission and to forbid thereafter examination into stale occurrences, say over two years ago, the policing provision in (f) is inadequate.

/s/ Thomas Lisi
Thomas Lisi
Secretary

October 30, 1963.

APPENDIX A

Article 25 as approved provides:

25. NEUTRAL BODY. There shall be a Neutral Body selected and appointed by the conference from responsible accountants or other person or persons, not a party to, nor employed by or financially interested in any party to the agreement upon such terms as are agreed between the conference and the Neutral Body. The Neutral Body shall have the following powers, duties and responsibilities.

1. To receive complaints in writing from members of the conference pursuant to their obligations hereunder to report malpractices.

2. To investigate said complaints and receive evidence thereon from members of the conference or from the conference offices or otherwise.
3. To engage agents, lawyers or other experts in connection with its investigation and consideration of complaints and to pay on behalf of the conference all costs incidental to engagement and use of such agents, lawyers and other experts.
4. To have absolute discretion to decide whether or not an infringement has taken place and the conference shall have no right to question such decision, subject to the maximum fines set forth below.

The maximum fines assessed by the Neutral Body shall be:

- a) First offense up to a maximum of U.S. \$10,000.00
 - b) Second offense up to a maximum of U.S. \$15,000.00
 - c) Third offense up to a maximum of U.S. \$20,000.00
 - d) Fourth offense and subsequent
offenses up to a maximum of U.S. \$30,000.00
5. To report to the extent appropriate the result of its investigation to Ethics Committee but without disclosing the names of complainants. The Ethics Committee shall notify the member lines through the conference Chairman.
 6. To give directions as to payment of fines after assessment and notification to the Ethics Committee.
 7. The undersigned lines promise to report immediately to the Neutral Body directly any apparent or alleged deviation from the conference agreement of its rules and regulations of correct and ethical practices thereunder which come to their attention and knowledge.

All lines agree to accept the decision (s) and any assessment(s) of fines thereof by the Neutral Body as final and binding.

8. To enable complaints to be investigated, the conference shall make available to the Neutral Body all records, correspondence and documents of every kind wherever located and give all assistance and information whatsoever verbal or otherwise which may be required by the Neutral Body at their absolute discretion. All the records of the freight conference at the secretary's office will also be available to the Neutral Body.
9. The conference members jointly and severally shall indemnify the Neutral Body against any liability to third parties including employees under any libel or other action which might be brought against the Neutral Body arising from the performance of its duties under this agreement. The conference members jointly and severally shall have no right to claim against the Neutral Body or their agents in any such libel or other action.
10. The retainer fee and other compensation for services of the Neutral Body shall be as agreed between the member lines and the Neutral Body.

APPENDIX B

The proposed modification of Article 25 is as follows:

Article 25. NEUTRAL BODY

(a) Appointment and Qualifications of the Neutral Body:

(1) The Conference shall appoint, upon terms to be fixed by separate contract, an impartial, independent person, firm or organization to be designated the Neutral Body which shall be authorized to receive written complaints reporting possible breaches of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice, and to investigate and decide upon such alleged breaches and, if such breaches are found, to assess damages, and in addition, to collect damages assessed, after payment thereof becomes delinquent.

(2) Appointment of the Neutral Body hereafter will be by vote of the Conference membership under Article 19 of the Conference Agreement. The appointment will be made from amongst candidates which are qualified and willing to serve.

Prior to such appointment, a candidate will be required to divulge to the Conference any material "professional or business relationships, financial interests or service contracts" (hereafter in this Article simply "interests") which it may have with any of the members, their "employees, agents, sub-agents or their subsidiaries or affiliates" (hereafter in this Article simply "agents"). The candidate will also be required to agree, in the event of appointment, to divulge any future proposals it might receive to create such interest, and promise to obtain Conference approval thereof before accepting any such proposal. Such interest so divulged, if any, will not affect the qualification of the Neutral Body when appointed by the Conference with knowledge thereof, and the members will not raise an objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint against a member with which it may have such an interest. After disqualifying itself the Neutral Body is authorized to appoint an agent without such interest in the respondent to conduct the particular investigation and handle the complaint on behalf of the Neutral Body and such appointee shall have all the authority and duties of the Neutral Body for that particular matter up through the date when the appointee reports its decision to the Ethics Committee under this Article 25 (f) (4).

(3) The Neutral Body will have the authority and responsibility to engage agents, lawyers and/or experts, including shipping experts, who can assist with its investigation and consideration of complaints and to pay on behalf of the Conference all costs incidental thereto. Such agents or experts appointed by the Neutral Body must not have any interest in the particular member named in the particular complaint.

8. To enable complaints to be investigated, the conference shall make available to the Neutral Body all records, correspondence and documents of every kind wherever located and give all assistance and information whatsoever verbal or otherwise which may be required by the Neutral Body at their absolute discretion. All the records of the freight conference at the secretary's office will also be available to the Neutral Body.
9. The conference members jointly and severally shall indemnify the Neutral Body against any liability to third parties including employees under any libel or other action which might be brought against the Neutral Body arising from the performance of its duties under this agreement. The conference members jointly and severally shall have no right to claim against the Neutral Body or their agents in any such libel or other action.
10. The retainer fee and other compensation for services of the Neutral Body shall be as agreed between the member lines and the Neutral Body.

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(2) Appointment of the Neutral Body hereafter will be by vote of the Conference membership under Article 19 of the Conference Agreement. The appointment will be made from amongst candidates which are qualified and willing to serve.

Prior to such appointment, a candidate will be required to divulge to the Conference any material "professional or business relationships, financial interests or service contracts" (hereafter in this Article simply "interests") which it may have with any of the members, their "employees, agents, sub-agents or their subsidiaries or affiliates" (hereafter in this Article simply "agents"). The candidate will also be required to agree, in the event of appointment, to divulge any future proposals it might receive to create such interest, and promise to obtain Conference approval thereof before accepting any such proposal. Such interest so divulged, if any, will not affect the qualification of the Neutral Body when appointed by the Conference with knowledge thereof, and the members will not raise an objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint against a member with which it may have such an interest. After disqualifying itself the Neutral Body is authorized to appoint an agent without such interest in the respondent to conduct the particular investigation and handle the complaint on behalf of the Neutral Body and such appointee shall have all the authority and duties of the Neutral Body for that particular matter up through the date when the appointee reports its decision to the Ethics Committee under this Article 25 (f) (4).

(3) The Neutral Body will have the authority and responsibility to engage agents, lawyers and/or experts, including shipping experts, who can assist with its investigation and consideration of complaints and to pay on behalf of the Conference all costs incidental thereto. Such agents or experts appointed by the Neutral Body must not have any interest in the particular member named in the particular complaint.

(b) Jurisdiction of the Neutral Body:

(1) The Neutral Body shall have jurisdiction to handle, in accordance with the procedures of this Article all written complaints submitted to the Neutral Body by the Conference Chairman or a member alleging breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or, on its own motion, any breaches of this Article 25; provided, that nothing herein contained shall change the functions of the Misrating Committee.

(2) "Malpractice" as used in this Article shall mean any direct or indirect favor, benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer, or other cargo interests or any of their agents, or any other act or practice resulting in unfair competitive advantage over other members.

(c) Member Lines' Responsibility to Report Breaches and Assist Investigations:

(1) The members and/or the Conference Chairman shall report promptly to the Neutral Body in a written complaint any and all information of whatsoever kind or nature coming to their knowledge which, in their opinion, indicates a breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or any breach of this Article 25 by a member or its agents, and failure to report such information by any member will be a breach of this Article.

(d) Investigation:

(1) The Neutral Body and/or its agents, shall have the power, authority and responsibility to investigate written complaints and in investigation said complaints to call upon a member or its agents at any of their offices during office hours and inspect, copy and/or obtain "correspondence, records, documents, signed written statements or oral information and/or other materisl" (hereinafter in this Article "materials"), which materials are deemed by the Neutral Body in its sole discretion to be relevant to the complaint. Upon making such a call the Neutral Body shall have the right to see and copy such materials immediately and without prior screening by the member or its agents.

(2) Correspondingly each of the members shall have the duty and responsibility to supply such materials, and to cooperate in interviews promptly upon demand made in person by the Neutral Body or its agents and without prior screening, whether said materials or personnel are located in the member's own offices or in its agents' offices. Failure of a member or its agents to supply the materials required by the Neutral Body or its agents promptly will constitute a breach of this Agreement by the member, and the member undertakes to thoroughly inform its agents of the member's liability for their conduct and obtain their commitment to comply with the Conference Agreement, Tariff Rates and Rules and Regulations. In addition the members undertake an affirmative duty to cooperate and assist the Neutral Body in obtaining other required information whenever possible.

(3) The records of the Conference will be made available to the Neutral Body on request and the Conference Chairman and staff will render all assistance possible to the Neutral Body during investigations.

(e) Confidential Information:

(1) The Neutral Body will under no circumstances disclose the name of the complainant to the respondent or anyone else including the Neutral Body's agents, unless specifically authorized to do so by the complainant.

(2) The Neutral Body will treat all information received during investigations regardless of the sources, as confidential and will not divulge any such information to anyone, except in reporting breaches found and damages assessed to the Ethics Committee, and then only to the extent that the Neutral Body itself deems appropriate.

(f) Hearing for the Respondent; Neutral Body Decisions and Announcement Thereof:

(1) On concluding its investigation, the Neutral Body will consider the information obtained and decide in its absolute discretion whether the facts have been sufficiently established to constitute a breach of the Agreement, Tariff Rates or Rules and Regulations, and if a breach is found which

was not covered by the complaint, such breach may also be reported and damages may be assessed thereon against any member liable.

(2) In deciding whether a breach exists based on the results of its investigation, the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead it will employ rules of common sense in determining breaches and assessing damages and the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach probably occurred.

(3) After the Neutral Body has completed its investigation and arrived at its tentative decision that there was a breach (but before announcing the breach to the Ethics Committee, and even before the amount of damages is decided), the Neutral Body will inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose. Within fifteen (15) days, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or counsel, and offer to the Neutral Body such explanations as it may choose at such meeting.

(4) The Neutral Body will then make its final decision and either discharge the respondent or assess liquidated damages against him. In assessing said damages, the members recognize that breaches of the Conference Agreement, Tariff Rates or Rules and Regulations cause substantial damages, not only in lost freight but in consequent instability of the Conference rate structure. The members further recognize that the damages caused are cumulative with the number of breaches, but the members further recognize that it is difficult to assess such damages precisely. Therefore the Neutral Body is authorized to assess liquidated damages in accordance with the following schedule:

- a) First breach: maximum of Ten Thousand Dollars (\$10,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

- b) Second breach: maximum of Fifteen Thousand Dollars (\$15,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- c) Third breach: maximum of Twenty Thousand Dollars (\$20,000) U.S.A. currency or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- d) Fourth breach and subsequent breaches: maximum of Thirty Thousand Dollars (\$30,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

After its decision the Neutral Body will then report to the Ethics Committee the decision and the amount of the damages assessed, if any. In addition the Neutral Body may report evidence or information discovered during its investigation, but the extent of such further reporting, if any, shall be subject to the absolute discretion of the Neutral Body, and in no event will the Neutral Body report the name of the complainant without consent, or report confidential information.

(5) The Ethics Committee will notify the members through the Chairman, of the decision and damages, if any, and will also at the same time instruct the Chairman to notify the respondent of the decision, but only if a breach is found, and in such case the respondent will be furnished with the Neutral Body report and a Conference debit note covering the liquidated damages assessed.

(g) Unquestioned Recognition of Decisions of the Neutral Body:

(1) The members agree to accept the decisions of the Neutral Body as valid, conclusive and unimpeachable, but it is understood between the members that decisions of the Neutral Body are not admissions or proof of guilt or liability under law.

(2) The members further agree that neither jointly or severally will they bring any action whatsoever against the Neutral Body or its

agents for damages allegedly arising out of its acts, omissions and/or decisions as the Neutral Body. In addition, each member agrees to hold the other members of the Conference and the Neutral Body and its agents harmless from any claims which may be brought by its agents or employees against another member, the Conference or the Neutral Body or its agents for damages allegedly arising out of the Neutral Body's acts or functions.

(h) Payment of Damages:

(1) The members will pay all damages duly assessed by the Neutral Body upon receipt of a debit note from the Chairman, and if not paid within thirty (30) days of receipt of the debit note, the damages will become delinquent under Article 28 of the Conference Agreement.

(2) The Neutral Body will have the power and responsibility immediately, without notice to or further authority from the Conference, to collect as agent for the Conference and by any measures recommended by legal counsel, any damages duly assessed, as soon as they become delinquent, from the deposit or substitute security submitted and maintained by the members under Article 12 of this Agreement. The Neutral Body will pay over to the Conference immediately all damages collected.

FEDERAL MARITIME COMMISSION

No. 1095

AGREEMENT NO. 150-21, TRANS-PACIFIC FREIGHT
CONFERENCE OF JAPAN AND AGREEMENT NO. 3103-17,
JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

This proceeding having been initiated by the Federal Maritime Commission and the Commission having fully considered the matter and having this date made and entered of record a Report containing

its findings and conclusion thereon, which report is hereby referred to and made a part hereof;

IT IS ORDERED, that Agreements No. 150-21 and 3103-17 are hereby approved.

By the Commission, October 30, 1963.

/s/ Thomas Lisi
Secretary

(SEAL)

[Served April 3, 1964 - FMC]

ORDER REOPENING PROCEEDING

By its Report and Order in Docket 1095, served October 30, 1963, the Commission approved Agreement No. 150-21, a modification of the basic agreement of the Trans-Pacific Freight Conference of Japan, and Agreement No. 3103-17, a modification of the basic agreement of the Japan-Atlantic & Gulf Freight Conference. Among other things, these modifications revise the self-policing procedure ("neutral body" system) through which the conferences police the obligations of their members.

On November 9, 1963, States Marine Lines, Inc. and Global Bulk Transport Corporation, member of both conferences, petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's Report and Order. Thereafter, the Commission moved the Court to remand the case to it, so that it might vacate its prior action and reopen and reconsider Docket No. 1095, pursuant to the authority vested in it by section 25 of the Shipping Act, 1916, and Commission Rule 16(a). The Court on March 16, 1964 granted this motion and remanded the case. Accordingly,

It is Ordered, That the Commission's Report and Order in Docket 1095, served October 30, 1963, are hereby vacated and withdrawn and the proceedings in Docket 1095 are reopened;

It is Further Ordered, That Agreement No. 150 and Agreement No. 3103, as amended and approved by the Commission to the date of this order,

shall remain in full force and effect except for Articles 10, 12 and 25, which articles shall remain in full force and effect as approved prior to October 30, 1963;

It is Further Ordered, That pursuant to sections 15 and 22 of the Shipping Act, 1916, the Commission enter upon an investigation and hearing to determine whether Articles 10, 12 and 25 as proposed to be modified by Agreement No. 150-21 and Agreement No. 3103-17 are unjustly discriminatory or unfair, detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916, and whether they should be approved, disapproved or modified pursuant to section 15 of the Act;

It is Further Ordered, That the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference and their respective member lines shall continue to be respondents in this proceeding, and that other persons who were previously parties to this proceeding may continue to participate therein;

It is Further Ordered, That any other person who desires to become a party and participate in this proceeding shall file a petition to intervene with the Secretary, Federal Maritime Commission, Washington, D. C., on or before April 17, 1964, with copy to respondents and other parties; and

It is Further Ordered, That this proceeding is assigned for hearing before an examiner of the Commission's Office of Hearing Examiners at a date and place to be announced by the Chief Examiner; that notice of this order shall be published in the Federal Register and copy thereof served upon the respondents and persons who were previously parties to this proceeding; and that all future notices issued by or on behalf of the Commission in this proceeding shall be mailed to all parties of record.

By the Commission, April 2, 1964.

/s/ Thomas Lisi
Secretary

(SEAL)

[Served May 15, 1964 - FMC]

ORDER EXPANDING ISSUES ON REHEARING

By its Report and Order in Docket 1095, served October 30, 1963, the Commission approved Agreement No. 150-21, a modification of the basic agreement of the Trans-Pacific Freight Conference of Japan, and Agreement No. 3103-17, a modification of the basic agreement of the Japan-Atlantic & Gulf Freight Conference. Among other things, these modifications revise the self-policing procedure ("neutral body" system) through which the conferences police the obligations of their members.

On November 9, 1963, States Marine Lines, Inc. and Global Bulk Transport Corporation, member of both conferences, petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's Report and Order. Thereafter, the Commission moved the Court to remand the case to it, so that it might vacate its prior action and reopen and reconsider Docket No. 1095, pursuant to the authority vested in it by section 25 of the Shipping Act, 1916, and Commission Rule 16(a). The Court on March 16, 1964 granted this motion and remanded the case.

The Commission, by its order served April 3, 1964, in Docket No. 1095 vacated its Report and Order in Docket No. 1095, reopened the proceedings, and pursuant to sections 15 and 22 of the Shipping Act, 1916, entered upon an investigation and hearing to determine whether Articles 10, 12 and 25 as proposed to be modified by Agreement No. 150-21 and Agreement No. 3103-17 are unjustly discriminatory or unfair, detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916, and whether they should be approved, disapproved or modified pursuant to section 15 of the Act.

On April 9, 1964, a motion was filed by States Marine Lines, Inc., one of the parties to Docket No. 1095, to expand the issues in the reopened proceeding to include within the scope of the Commission's investigation Articles 10, 12, and 25 of Agreements No. 150 and 3103 as they now stand

approved by the Commission as well as the proposed modification thereof embodied in Agreements 150-21 and 3103-17, respectively.

A reply in support of the motion was filed by Hearing Counsel. No opposition to the motion was filed by any party of record.

It appears that the issues in this proceeding can best be resolved by a general inquiry into all pertinent aspects of the neutral body systems of the respondent conferences, encompassing both the neutral body systems as they now stand approved by the Commission, and as proposed to be modified by Agreements No. 150-21 and 3103-17. Accordingly,

IT IS ORDERED, That the motion of States Marine Lines, Inc. be granted; and

IT IS FURTHER ORDERED, That the 3rd ordering paragraph of the Commission's order served April 3, 1964 in Docket No. 1095 be deleted, and the following paragraph substituted therefor:

"It is Further Ordered, That pursuant to Sections 15 and 22 of the Shipping Act, 1916, the Commission enter upon an investigation and hearing to determine whether or not Articles 10, 12 and 25 of Agreements 150 and 3103, as they now stand approved by the Commission, and the proposed modification thereof embodied in Agreements 150-21 and 3103-17, respectively, are unjustly discriminatory or unfair, detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916; and whether they should be approved, disapproved or modified pursuant to section 15 of the Act;"

By the Commission, May 7, 1964.

/s/ Thomas Lisi
Secretary

(SEAL)

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS
PREHEARING CONFERENCE

FEDERAL MARITIME COMMISSION

Room 114, The Centennial Building
1321 H Street, N. W.
Washington, D. C.

Tuesday, June 16, 1964

The above-entitled matter came on for prehearing conference, pursuant to notice, at 10:00 o'clock a.m., before JOHN MARSHALL, Examiner.

* * * * *

MR. WARREN: Mr. Examiner, I should like to make a rather brief statement, if I may.

Of course, as you undoubtedly know and hearing counsel appreciates and I am sure Mr. Galland does, the so-called neutral body controversy, starting with Docket 920 and still going on in the current docket, Docket 1095, has raged, let us say, for approximately three years and perhaps more. Perhaps we have reached a time when we might consider — before proceeding with another long, drawn-out affair in the way of a hearing — explorations regarding possible negotiations regarding a possible compromise. It is our proposal this morning that since intervener and States Marine Lines — well, States Marine Lines and Hearing Counsel — are the ones that have cause to remand of the case from the Court of Appeals of the District of Columbia and which desire this reopening, which desire the vacation of the agreements which you have marked Prehearing Exhibits 1 and 2. It is our proposal — assuming they are willing — to request of them, respectively, that both Hearing Counsel and intervener submit to us their proposed modifications of these two agreements as they would view the agreements comporting with the law. Mr. Galland and Hearing Counsel have raised the question that the agreements in their present form do not comport with the Supreme Court decision in Silver. They possibly have other objections.

In order to eliminate either the possibility of another hearing on this matter, I submit if Hearing Counsel and intervener submit to us their

particular modifications -- either by way of point indication or specific language -- that we, as attorneys for the conferences, will consider this language. If we find it in accordance with law and if it is believed by us to be reasonable and if it comports with what we think the neutral body should be -- in any event, we would like --

EXAMINER MARSHALL: You will buy it if you like it.

MR. WARREN: That is right. In any event, we will submit it to the conferences and give our clients our recommendations on whether or not to accept it or reject it, following which, I would propose a second prehearing, if it is at all necessary.

We offer this in the greatest of good faith.

* * * * *

- 8 MR. WARREN: There could be, Mr. Examiner, some point in sitting around the table. Frankly, I might add that just yesterday we were definitively retained in the case. At this particular point in time, it would be difficult -- in view of the long and extensive background of the case -- for me to enter into such discussions. I felt initially -- in the light of the fact that both Hearing Counsel and intervener urged that the case be remanded -- the Commission having already approved these modifications -- that these parties certainly know the reasons why they wanted a remand, why the agreement is unlawful as it now stands, speaking of the proposed agreement -- the agreement that we offer at the present time. If they would delineate -- in view of all circumstances in light of the present state of the law since Silver -- either point references or either specific language by way of modification to these agreements, we, as attorneys for both conferences, would undertake diligently to inspect the modifications,
- 9 present it to our clients and obtain a definitive conclusion as to whether or not we are able to accept it, this possibly obviating possible necessity for a long, drawn-out, expensive hearing.

I might say one final thing. Aside from the fact that this is an offer in the greatest of good faith and has been discussed, as a matter of fact, between ourselves and the clients, that for the sake of arriving at a neutral

body system through the hearing process and for that sake alone, I think it is a rather costly expense. We are not interested in that. We are interested in getting the neutral body, in getting a self-policing organization that at least appears to be approvable.

Now, once — assuming we agree to the modifications submitted — the Commission nevertheless wants to go forward with a hearing and investigation, that would be its option, or if States Marine still wanted to go forward or to file a complaint on some other grounds, I couldn't conceive of it, if we accepted their modifications, and that would be a different thing.

* * * * *

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Federal Maritime Commission
Room 114, Centennial Bldg.
1321 H Street Northwest
Washington 25, D. C.

Tuesday, September 15, 1964

* * * * *

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EXAMINER MARSHALL: No date is without some possibility of

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conflict with something. I would like to have an idea of how long we are going to run because sometimes we get a little bit out of hand and a little more than they need to, and you can help an awful lot by sitting late, sitting on Saturdays when you have to, and somehow or another counsel can get a little more specific all of a sudden.

MR. GALLAND: I wouldn't think it would go more than five days. I think I am pessimistic in that guess.

EXAMINER MARSHALL: If, in the middle of the week, it looks like it may run longer, we can alleviate that situation by having longer days. Is the 19th all right with you, Mr. Warren?

MR. WARREN: Yes, it is.

EXAMINER MARSHALL: Very well, hearings will begin on the 19th here in Washington. I will issue notice.

* * * * *

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FEDERAL MARITIME COMMISSION

----- X
 AGREEMENT NO. 150-21, TRANS-PACIFIC :
 FREIGHT CONFERENCE OF JAPAN AND :
 AGREEMENT NO. 3103-17, JAPAN-ATLANTIC : No. 1095
 AND GULF FREIGHT CONFERENCE :
 ----- X

Federal Maritime Commission
 Room 147 Centennial Building
 1321 H Street, Northwest
 Washington, D. C.
 Monday, October 19, 1964

The above-entitled matter came on for hearing, pursuant to notice,
 at 10:00 o'clock a.m., before JOHN MARSHALL, Examiner.

APPEARANCES:

CHARLES F. WARREN, ESQ., of Graham, James & Rolph,
 1725 DeSales St., N. W., Washington, D. C.,
 appearing in behalf of the respondents
 Trans-Pacific Freight Conference of Japan and
 Japan Atlantic Gulf Freight Conference.

GEORGE GALLAND, ESQ. and AMY SCUPI of Galland,
 Kharasch, Calkins & Lippman, 1824 R Street
 N. W., Washington, D. C., appearing in behalf of
 States Marine Lines

ROBERT J. BLACKWELL, ESQ. and ROGER McSHEA, ESQ.,
 Hearing Counsels, Federal Maritime Commission.

* * * * *

4 MR. GALLAND: Yes. I would like to call Mr. John Tilney
 Carpenter to the stand as witness for States Marine Lines.

WHEREUPON ---

JOHN TILNEY CARPENTER

a witness called for examination by counsel on behalf of States Marine Lines, having been first duly sworn, was examined and testified as follows:

* * * * *

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DIRECT EXAMINATION

BY MR. GALLAND:

Q. Mr. Carpenter, will you proceed to read your statement which I believe includes adequate identification as to who you are and what your occupation is and has been?

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A. My name is John Tilney Carpenter. I am a Vice-President of States Marine Lines, in charge of its law department. In that capacity, I have general responsibility within the framework of general management policy for States Marine's regulatory problems, including its legal position in relation to the many conferences — about 25 — in which it holds membership. I have held my present position for over seventeen years. Before joining States Marine, I was a practicing lawyer in New York, having been admitted to the New York bar in 1917. I am also a member of the bar of various federal courts including the Supreme Court. My practice before coming to States Marine was mainly concerned with admiralty and shipping problems, including a wide spectrum of regulation controversies under the Shipping Act.

* * * * *

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THE WITNESS This Amendment was approved by the Board on March 12, 1959 — a full year after the Neutral Body System was inaugurated.

The amendment provided, in substance, that a Neutral Body be appointed to receive and investigate complaints against member lines; decide whether malpractices or violations had occurred; and assess fines against members where violations were found. The Amendment specifically

provided that the Neutral Body be "selected and appointed by the Conference from responsible accountants or other person or persons, not a part to, nor employed by, nor financially interested in any party to the Agreement" States Marine had accepted in principle the adoption of the Neutral Body system and had agreed to the Amendment subsequently approved by the Commission providing for the appointment of a Neutral Body. The reason States Marine consented was that the adjective "neutral" in the designation "Neutral Body" imparted a clear presupposition of neutrality in fact and in law, and the attribute of neutrality was literally guaranteed by the stipulation against persons or organizations employed by or financially interested in the Conference members.

* * * * *

35 THE WITNESS: States Marine did not know, at the time Lowe,
36 Bingham was selected, that Lowe, Bingham was not qualified as a Neutral Body under the above-mentioned test of neutrality.

* * * * *

THE WITNESS: Despite its lack of neutrality and the absence of Maritime Board approval for neutral body system, Lowe, Bingham began immediately to perform its policing routine and on January 13, 1959, its representatives made an unannounced visit to the Tokyo office of States
37 Marine for the purpose of investigating a complaint that States Marine had granted free passage from San Francisco to Japan to Japanese exporters of Mandarin oranges during the 1959 season.

* * * * *

42 THE WITNESS: Lowe, Bingham found evidence in the Tokyo office that such passage had been requested by the shippers, but none indicating
43 that their request had been granted. Lowe, Bingham then directed its New York correspondent, Price, Waterhouse & Co., to investigate States Marine's records in New York. States Marine learned shortly after Price, Waterhouse sought its New York records, that Price, Waterhouse was the regularly employed accountant of States Marine's competitor,

United States Lines, a member of the Trans-Pacific Conference; that it was Lowe, Bingham's regular New York correspondent; that Lowe, Bingham was Price, Waterhouse's regular Tokyo correspondent and that in such capacity Lowe, Bingham regularly audited the books of United States Lines in Japan.

States Marine initially proposed to Price, Waterhouse that States Marine's regular accountants, Peat, Marwick, Mitchell & Co., be employed to investigate its New York records under the direction of Price, Waterhouse. This suggestion was motivated by States Marine's reluctance, in view of its membership in some 25 or 26 conferences, to expose its financial records to inspection and analyses by representatives of lines which competed with States Marine over most of the world's major trade routes.

* * * * *

45 THE WITNESS: The States Marine proposal was peremptorily re-
jected by Lowe, Bingham who insisted that Price, Waterhouse be permitted
to investigate States Marine's records directly, and stated that refusal of
access was a breach of the Neutral Body amendments to the Conference
46 agreement.

* * * * *

47 THE WITNESS: "States Marine, having discovered the non-neutrality
of Lowe, Bingham, ultimately refused to disclose its records to Lowe,
Bingham or to Price, Waterhouse as Lowe's agent."

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49 THE WITNESS: "Lowe, Bingham then revealed that despite their
formal agreement to serve as a 'Neutral' Body, they had never heard of
the neutrality requirements, which they characterized in a letter to the
Conference of June 30, 1959, as 'particularly unfortunate and contrary to
the spirit which prevailed at the time of our meetings with the Committee
of Ten' --

* * * * *

50 THE WITNESS: Continuing the quote:

" 'It was then most strongly emphasized to us . . . that our appointment should not be hedged around with restrictions of any kind.' In this letter, Lowe, Bingham requested the Conference to 'clarify' the clause requiring neutrality on the part of the Neutral Body and offered 'to meet the member lines for clarification and such action as may be necessary in order to insure our continuing authority and position and that of our appointees' ".

"To cure the defect of its Neutral Body's non-neutrality, the Trans-Pacific Conference adopted, over the objection of States Marine, a Resolution to the effect that the requirement of neutrality in the Neutral Body did not extend to agents appointed by the Neutral Body."

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51 THE WITNESS: "States Marine was not the only objector to this Resolution. Conference counsel, who was present at the meeting in which the Resolution was adopted, told the Conference lines that it constituted a new article 15 Agreement requiring Commission approval, and also that any departure from neutrality would destroy the effectiveness of the Neutral Body system. This advice was confirmed in a letter written by the firm of Hill, Betts, Yamaoka and Logan, who stated:

" 'If the Conference desires to give the neutral body unrestricted powers in the appointment of its agents, lawyers, or other experts, it is our opinion that the Conference agreement should be amended to so provide. However, to be consistent, the interest qualifications of the neutral body should also be eliminated, which, in our opinion, would destroy its effectiveness.

" 'It may be that upon receipt of the resolution or clarification regarding agents which was adopted at the Conference meeting, the Federal Maritime Board may suggest that the Conference agreement be amended to set forth this clarification, as it is our opinion that the clarification resolution constitutes a change in the conference agreement.' "

52 "In order to avoid submitting its amendatory resolution to the Board,
the conference simply resolved to overrule its counsel and keep the
Board in ignorance. The Conference position was summarized by the
spokesman for one of the Japanese lines who said:

" 'Mr. Chairman, the Conference is free to decide against
counsel's opinion. We decided that way, so it stands.' "

* * * * *

58 THE WITNESS: "Some two weeks before the adoption of this Reso-
lution, the Neutral Body had written a letter to the Ethics Committee of the
Conference, stating that it was fining States Marine \$10,000 — the maxi-
mum fine for a first offense — for 'intent to commit a breach' and 'refusal
to allow the independent body or their appointees access to records.'
States Marine was not notified of the fine until three weeks later — after
the Conference had adopted its 'clarifying' resolution. The Conference
then issued a debit note against States Marine in the amount of \$10,000.

59 States Marine rejected the assessment as illegal and demanded that
it be withdrawn. The Conference refused to withdraw the debit note; in-
stead, it passed a Resolution authorizing the chairman to draw on States
Marine's indemnity bond for the amount assessed. Thereupon, States
Marine filed a complaint with the Federal Maritime Board requesting it
to order the Conference to desist from attempting to collect the fine until
the legality of the Conference's actions was determined in the complaint
proceeding, and asked the Board to declare the assessment of the fine and
the actions of the Conference in violation of its approved agreement and of
section 15 of the Shipping Act.

"States Marine's complaint was docketed as No. 920. The Conference
then stipulated with States Marine that the collection of the fine be deferred
until final determination of the proceedings in No. 920. In consequence of
the stipulation, States Marine withdrew its resignation notice which had
been tendered to the Conference in November 1960, at the same time that
States Marine filed its complaint before the Maritime Board.

"While the complaint was pending, and the stipulation of forbearance was in force, Lowe, Bingham in February 1961 again visited States Marine's Tokyo office, this time for the purpose of investigating Mandarin orange shipments during the 1960 season — one year later. States Marine refused access to its records pending a determination by the Board in Docket No.

60 920 as to whether Lowe, Bingham was a lawful Neutral Body under the approved agreement. Lowe, Bingham then levied a second fine, this time in the amount of \$15,000. This was the maximum amount for a second offense, although the question whether ther had ever been a first offense was yet to be decided in Docket 920. A debit note for \$15,000 was then issued by the Conference."

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THE WITNESS: "Again, States Marine tendered notice of resignation from the Conference and again it filed a complaint before the Maritime Board requesting that the Conference be ordered to desist from levying fines while the power of Lowe, Bingham to serve as Neutral Body was under review by the Board. The Board granted States Marine's request and ordered the Conference to desist from collecting the fines assessed against States Marine until the proceedings had been terminated. After the cease and desist order was entered, States Marine withdrew its notice of resignation from the Conference. Nevertheless, two months later, in April 1961, Lowe, Bingham visited States Marine's Tokyo office, this time addressing a request to Isthmian Lines, Inc., — a wholly-owned subsidiary of States Marine" — I should say there a wholly-owned subsidiary of States
61 Marine and of its affiliates, Global Bulk Transport, Inc. — "seeking access to all Isthmian documents relative to Mandarin oranges for a particular season. Isthmian refused Lowe, Bingham's demand, again referring to the pending proceeding in Docket No. 920. For this refusal, Isthmian was fined \$10,000, the maximum for a first offense. Characteristically, notice of the fine was withheld until after Isthmian, which had filed a resignation notice along with States Marine after the second fine was levied on States

Marine, had cancelled its resignation notice upon entry of the desist order. After notice of the fine, Isthmian filed a complaint with the Board."

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BY MR. GALLAND:

Q. When the first fine was assessed by Lowe, Bingham against States Marine, do you remember whether Lowe, Bingham instantly informed States Marine that the fine had been levied? Or did it defer the notice until some later time? A. The notice was deferred two or three weeks, as I recall?

Q. Your testimony above has, I think, indicated it was deferred until after the controversial resolution was adopted at the conference meeting. Is that not true? A. In those two or three weeks, I think it was three weeks, in the meantime that meeting which I have previously testified occurred.

Q. And do you remember whether in connection with the second fine against States Marine there was a postponement, a delay, between — A. Yes.

Q. — the time the fine was voted and the time States Marine was notified? A. There was a hiatus of time, again I think it was two weeks.

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MR. GALLAND: Thank you.

THE WITNESS: "The Board's report and order in Docket No. 920, issued April 16, 1962, sustained States Marine's complaint in full" — citation 7 F.M.C. 204; reconsideration denied, 7 F.M.C. 257.

* * * * *

THE WITNESS: "The Board found that the selection of Lowe, Bingham was in violation of the neutrality provision of the Conference agreement, and that the Conference's resolution 'interpreting' its amendment was a modification of the Neutral Body Amendment which required Board approval before it could be lawfully effectuated. The Board found that the fines levied against States Marine were unlawful and unenforceable, and that the respondent Conference must desist from attempting to collect the fines and from operating in violation of its Neutral Body Amendment."

"The conference appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit, which sustained the decision in Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission, 314 F.2d 928 (C.A. 9, 1963), affirmed on reconsideration" — I don't have the citation.

* * * * *

"The Commission has approved, as we have indicated, the amendment incorporated in Article 25 which plainly enough provides that the Neutral Body must be truly neutral and not include anyone employed by, or financially interested in any member of the Conference. Whether a further amendment eliminating this requirement of true neutrality would have ultimately been approved by the Board is something on which we are not required to speculate. But it is worth noting that when the Lowe firm undertook to impose fines aggregating \$25,000 upon States Marine they were obviously doing something which the Board could find was operating to the detriment of the commerce of the United States. States Marine was operating in that commerce and a few repetitions of this fining process could easily put it in the hands of a receiver.'

"Likewise, the Court sustained the Commission's finding that Lowe, Bingham was not a 'Neutral' Body within the meaning of Article 25 and that the selection of Lowe was therefore a violation of section 15 of the Shipping Act. The Court said:"

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THE WITNESS: "The Court said:

"It is obvious that if the Lowe firm were to continue to act as the Neutral Body, it would be necessary to amend the portion of Article 25 above referred to so as to eliminate therefrom the language which requires the Neutral Body not be a person "employed by" a party to the agreement. This was never done; yet the Conference went ahead with the utilization of the Lowe firm as a Neutral Body just as though such an amendment had been made and approved by the Board.'

"Following the Court of Appeals' decision that the Conference had violated section 15, the Justice Department sued both the Trans-Pacific Conference and the Japan-Atlantic Conference -- which had also engaged Lowe, Bingham under an identical neutrality provision -- for the statutory penalties for violating section 15 of the Shipping Act. In the Trans-

72 Pacific suit, all of the member lines of the Conference, including States Marine, were made defendants. Although States Marine had opposed the illegal activities of Lowe, Bingham every step of the way, it was a member of the Trans-Pacific Conference, and hence liable for the statutory penalties. The suit, United States v. Trans-Pacific Conference of Japan, N.D. California, So. Div., Civil No. 41349 (1963) was finally settled out of court for \$25,000 -- a portion of which was paid by States Marine."

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THE WITNESS: "States Marine's position, that the Neutral Body must truly be neutral, was finally vindicated after three years of continuous, active litigation. The vindication was costly; three complaints were filed before the Board; long hearings were held in California; the Conference appealed (successfully) to a Court of Appeals from the Board's interim desist order; it also appealed (unsuccessfully) to another Court of Appeals from the Board's final order; and even after the States Marine complaint had been sustained by the Board and the Board had been sustained by the Court, States Marine was sued by the Government (in company with the Conference lines by whom it had been wronged) for statutory penalties in an action which it was obliged to compromise."

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73 THE WITNESS: "States Marine had hoped that the result of this protracted and expensive contest would be the inauguration of a policing system administered by a neutral Neutral Body. The Conference, however, before the Commission issued its decision in Docket No. 920, filed a further amendment of its agreement to provide for an officially biased

Neutrality Body. This amendment provided that the Neutral Body must disqualify itself from acting in an investigation if it should be affiliated with the accused line. No such disqualification was imposed, however, where the affiliation was with the complaining line. Similarly, the amendment expressly allowed any agent or expert appointed by the neutral body to be affiliated with any line in the Conference except the line under investigation. This amendment was the immediate cause of the present proceedings. The amendment redefined neutrality as meaning 'neutrality' in favor of the accuser and against the accused."

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74 THE WITNESS: "The deletion of the requirement of neutrality in the 'Neutral' Body was not counterbalanced by any restrictions on either the power of the potentially non-neutral body to put a line 'in the hands of a receiver', or on the procedures whereby such power would be wielded. Thus the non-neutral body was not required to inform the complaining line of the nature of the complaint or the identity of the complainant."

* * * * *

77 A. "The non-neutral body was liberated from any legal standards, being told only to satisfy itself, on the basis of evidence persuasive to itself alone, that a violation 'probably' occurred. The non-neutral body was not required to disclose any evidence to the alleged violator, or even to be guided by evidence. The non-neutral body could tell — or refuse to tell — the respondent 'the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose'. Following such 'disclosure' (or non-disclosure) the suspect was allowed to seek an audience with the non-neutral body to offer 'such explanation as it may choose'. The only hearing thus accorded the suspect was a meeting to be held after the non-

78 neutral body had arrived at its tentative — but undisclosed — decision. For example, the non-neutral body could tell the accused line that it was tentatively adjudged to have given a rebate. The Body was under no

obligation to name the form of rebate, the cargo, the date, the place, the amount, the recipient, or any other detail. If the suspect's 'explanation' did not satisfy the non-neutral body, it was empowered to assess a fine ranging up to \$10,000 for a first offense and \$30,000 for a fourth offense — the decision as to whether it was a first or fourth offense to rest, of course, in the non-neutral body's unreviewable discretion. The amount of the fine was to be reported by the non-neutral body to the 'Ethics Committee' of the Conference without any supporting information if the non-neutral body chose to give none, and the Ethics Committee was then to notify the accused of the non-neutral body's decision — but only if such decision resulted in a fine. The accused was never to be informed of an acquittal. The Conference was then empowered to draw on the convicted line's security bond. By the proposed modification, all Conference lines agreed to hold the non-neutral body harmless from any damage flowing from its acts or omissions, and waived any appeals from its fines."

* * * * *

79 THE WITNESS: "As stated, the new amendments were vigorously opposed within the Conferences by States Marine, which refused to sign the amendatory agreements. Nevertheless, they were adopted by two-thirds of the members of both Conferences and, pursuant to the basic agreements which purportedly permit amendment by a two-thirds vote, were then submitted to the Commission under the false representation that they embodied the agreement of all member lines. The Commission announced the filing of the amendments in the Federal Register of October 6, 1962, and invited public comment. States Marine protested, objecting to the non-neutrality of the Neutral Body, to its unlimited investigatory powers, to the total lack of due process in the Neutral Body procedure, and to the defective method by which the Amendments were adopted, in that they were submitted to the Commission as an agreement among all member lines whereas States Marine did not agree to them and had refused to sign them."

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152 THE WITNESS: *** In subparagraph (e), States Marine set forth the
 153 authority of the Neutral Body. The Neutral Body is empowered to
 receive complaints, to investigate them, to employ agents, to examine
 records, to hold hearings, to report its findings to the Conference and to
 impose fines. The significant differences between the powers of the Neutral
 Body as set forth by States Marine and the powers of the Neutral Body as
 embodied in the Conference agreement is that the accused is granted
 certain safeguards in the States Marine proposals which are not present
 in the Conference modification. Thus, the Neutral Body's authority to
 employ agents and attorneys is restricted to those agents and attorneys
 who are neutral to the same extent as the Neutral Body itself. The Neutral
 Body's power to examine all records is limited in that a member line may
 request that its accounts or financial records be investigated by its own
 auditors under the Neutral Body's direction. This provision has been in
 effect in several Neutral Body systems of othe conferences and has not
 impeded the effective functioning of any Neutral Body. The Conferences
 offer no word of criticism of this proposal, yet they reject it.

* * * * *

159 The final provision in States Marine's proposed modification sets
 forth some guidelines for the imposition of penalties by the Neutral Body
 and by the arbitrators. The Conferences offer no word in criticism of
 any criterion among the seven criteria listed, yet they reject them all.

The listed criteria should serve as a brake to the demonstrated
 impetus of the Neutral Body to assess maximum fines wherever a breach
 — no matter how technical — has been found, or wherever their authority to
 act has been questioned. States Marine's experience has been that the
 maximum penalties provided in the Conference agreement are assumed
 by the Neutral Body to be the standard fines. As I have related in some
 detail above, Lowe, Bingham as Neutral Body assessed the maximum
 fine against States Marine and once against Isthmian for the offense of

declining to produce records while the authority of Lowe, Bingham to act as Neutral Body was under review by this agency. On appeal of the

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Commission's decision in the Trans-Pacific Freight Conference of Japan case, Judge Pope noted that a few repetitions of Lowe, Bingham's fining propensities could easily have put a line in the hands of a receiver. It is important that the Neutral Body understand that its power to put a line into receivership is not equivalent to a mandate to do so.

States Marine's experience that fines levied by Neutral Bodies are out of all proportion to offenses found is not limited to its experience with Lowe, Bingham. In the Pacific Westbound Conference, States Marine was fined by Arthur Young — the same Neutral Body which now serves the respondent Conference — \$2,500 plus \$5,582 in unitemized fees and expenses in connection with a shipment which involved an inadvertent undercharge of approximately \$93 on containerized cargo.

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THE WITNESS: The circumstances under which this fine was assessed are particularly relevant. The shipper had supplied States Marine with measurements which turned out to be very slightly understated. Of course, States Marine was not required to verify the measurements of the cargo in the sealed container, but it was under a duty to demand from the shipper a sworn certificate that the measurements were correct. States Marine had received a statement from the shipper, but had neglected to obtain a notarized certificate. For this — infraction — as technical as could be conceived — States Marine was fined \$2,500 plus staggering costs in addition.

A \$2,500 fine for an infraction so technical is completely out of line with the fines which courts have imposed for willful violations of the

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Shipping Act. In a recent case in the District Court of New Jersey, Swan Products Corporation, a shipper, was fined \$500 on each of three counts for willfully understating the measurements of three successive cargo shipments.

As stated above, not only was States Marine fined in this instance \$2,500, but it was assessed \$5,582 for Neutral Body fees and expenses. This assessment underscores the necessity for having the fees of the Neutral Body paid out of the Conference treasury.

Under the Pacific Westbound Conference agreement, a line which is found guilty not only pays a fine, but pays the expenses of the Neutral Body. I have already indicated that we believe such a provision conflicts with the Supreme Court decision in *Tumey v. Ohio*. In our recent experience in the Pacific Westbound Conference, this provision led to the amount of the fine being about 60 times the amount of the undercharge. Moreover, the Neutral Body investigation involved 30 bills of lading. The Neutral Body found violations on only two bills of lading. Yet, it assessed its entire investigatory cost upon States Marine. Thus, States Marine was sentenced to \$8,000 of total penalties for a technical, unintentional, \$93 infraction.

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166 It is important to realize that in both trades in which these Conferences function, dual rate contract systems have been proposed and soon will be in effect. While the Conference system is a "voluntary" system, a line cannot choose to operate outside a dual-rate Conference without suffering severe losses of cargo. Furthermore, both Conferences have a system, which States Marine attacks in this proceeding as illegal under Section 15 of the Shipping Act, wherein changes in the basic agreement may be made by two-thirds of the membership and submitted to the Commission as the agreement of all member lines in the Conference. Thus a member line which resists the awesome power of the Neutral Body is in a serious dilemma. Either it resigns from the Conference and loses access to all contract shippers, or it continues as a member of the Conference, subjecting itself, against its wish and notwithstanding its vote, to the Neutral Body's power to put it in receivership.

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Tuesday, October 20, 1964

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176

JOHN TILNEY CARPENTER

resumed the stand and testified further as follows:

CROSS-EXAMINATION

BY MR. WARREN:

* * * *

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Q. Now, as I understand this provision, the operation of it, the accused would select its own auditors or either some other outside auditors, and the designation, the selection would be on the part of the accused? A. The regular auditors.

* * * *

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Q. Who would compensate the auditors used for this purpose?
A. Why, the accused, of course. It is his auditors.

Q. The accused? A. That is the way it works. It worked in the Pacific Westbound Conference.

Q. Yes. A. The same formula.

Q. Yes. A. The two work together. That is all.

Q. Would these regular auditors that you would inject under this provision between the neutral body and the accused work solely under the direction of the neutral body? A. Yes.

Q. The accused line would not in any way direct the activities, is that correct? A. No — correct, except that the accused as far as I am concerned, we have had experience with Arthur Young here who are the neutral bodies of the Pacific Westbound Conference. They have come in. The say, "We want to see your books, your financial records," and that is
182 in regard to so and so. So we say, "All right, work it out with Peat, Marwick & Mitchell," so the two of them work together.

Peat, Marwick & Mitchell knows where to look for things and we let them work together and leave them alone.

Q. Yes. In reality, Mr. Carpenter, would not the accused line's regular auditors then be working as an arm of the neutral body? A. Yes, it would.

* * * * *

186 Q. Mr. Carpenter, haven't you just said that this intermediary auditor would be truly acting as an arm of the neutral body itself in the performance of its functions? A. You mean by the accused line's auditor?

Q. Yes. A. He is acting as an agent.

Q. Of the neutral body? A. That is correct.

* * * * *

204 Q. Under Article 10(i) of the proposal, if you would take a look at that, please, dealing with the subject of arbitration — A. Oh, yes.

Q. Why do you want arbitration? A. Because I consider a right of appeal as absolutely necessary.

Q. What makes you feel that arbitration would serve any purpose other than delay, since under the terms of your neutral body proposal the neutral body would have to be neutral under your own standards.

A. Will you say that again, please?

Q. What purpose would arbitration serve under the terms of reference of your own proposal except delay, bearing in mind your own proposal under your own terms of reference sets up a neutral neutral body. A. I didn't say that the neutral body would make a just decision. That is the point. The arbitration would be sort of an appeal, like an appellate court, to prevent run-a-way decisions by a neutral body.

* * * * *

207 Q. Now, do I understand that if there are records in the files of the accused line which are not accounts or financial records that the neutral body, under your proposal, can make a direct examination of those records? A. Yes.

Q. What do you mean by direct examination? A. Well, if a neutral body wants to go into our pier and look at some records there having to do with dock receipts, he can do it.

Q. He can go directly to your files in the case of those records?

A. Yes.

Q. That are not accounts or financial records? A. Yes.

* * * *

210 Q. Mr. Carpenter, returning now to Article 10 (f) 1, I think that is the provision that requires that the identification of the complainant be made known; is that correct? A. Yes.

* * * *

211 Q. What purpose does this serve, Mr. Carpenter? A. I would say it serves the purpose of justice, that the accused has the right to be confronted with his accuser and know who is making this complaint. The complaint may be entirely unjustified, may be out of spite, and if so, I think the complainant should be identified, and if he is an honest complainant he would have nothing to suffer by appearing as such.

* * * *

214 Q. They have to wait a 10-day option period? A. Correct. May I elaborate on that 30-day period just a minute?

EXAMINER MARSHALL: Go right ahead.

THE WITNESS: Supposing a complaint is made that our agent in Algeria or Alexandria or somewhere in Bombay has given a rebate.

215 I want 30 days in which to investigate and that might be all too short, but we have to have some period during which I can make an investigation and put in my answer, not be judged immediately on the basis of unsupported testimony or secret evidence which I can't meet.

I again say that I am speaking from my own point of view. It is not altogether hypothetical, but I have had considerable experience in this.

* * * *

245 Q. Does States Marine really want an effective neutral body system?

MR. GALLAND: I object to this question. It doesn't make any difference if they do. If they are living under a neutral body system, they want it the way they propose to have it. Whether it is their religion there should be neutral bodies doesn't make any difference.

EXAMINER MARSHALL: The witness may answer.

THE WITNESS: It depends on what you mean by "effective". By "effective", I mean a just and equitable one, which is workable. Somebody else may think effective means something else. That's my definition of it and that is what we want for all concerned.

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298 MR. WARREN: At this time, I am not prepared to cross-examine on this statement, so I would prefer that Hearing Counsel go forward.

EXAMINER MARSHALL: Very well.

BY MR. McSHEA:

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299 Q. Do you feel, Mr. Carpenter, that there would be any inhibitions to effective neutral body self-regulation should the right of the accused to know of his accuser be granted? A. I don't know that there should be. I don't see why the sanctity of an accuser should be so great as to overcome the right of the accused to know who is telling about him and if it is through malice, to know that, let him stand up and be counted.

300 Now, I am certainly not going to make — unless I am darn sure that it is correct — I am not going to make any accusation against a fellow conference member and if I have to be put in the spot of living up to my conference agreements, and I find that there is a misbehavior or what they call a malpractice by somebody, and I consider it my duty to report it, I certainly consider it is only fair to the other fellow to let him know who is doing it.

Q. In your opinion, Mr. Carpenter, has the neutral body system worked effectively in the Trans-Pacific Freight Conference of Japan in the last three or four years? A. I don't think it has at all.

* * * * *

301 THE WITNESS: I don't think it has been effective at all in my definition of the word "effective."

I think we have gotten an awful raw deal being fined \$35,000 because there wasn't a single malpractice or anything proved.

If you want to call that effective, I would say it was vindictive.

BY MR. McSHEA:

Q. In your view, has States Marine been prejudiced? A. Yes, very much so, indeed. The shippers in particular from Japan and this goes around, sir, the old adage of where there is smoke there is fire and where there is a whispering gallery and whispering and savage penalties inflicted because of procedural difficulties or misunderstandings, I don't think that I would call that effective and I certainly would call it prejudicial and it has hurt us very badly in the market.

302 I don't know whether that was the reason why it started or not, but the fact is that it has hurt us terribly with shippers as well as in the public eye.

Q. Do you believe that any particular party, be it steamship shipper or otherwise has any bone to pick with States Marine which they pick by way of subjecting States Marine to these proceedings? A. It might very well be. Human nature being what it is, accusations can be made for any motive at all.

Q. Do you have any particulars to back this up? A. No, sir, I do not. That is why I want to have a system where that cannot happen or at least has a tendency to be stopped.

* * * * *

303 Q. Does States Marine Line oppose the principle of a neutral body, in general? A. No. we do not. I will go to a memorandum of several

years ago and had it appended for the benefit of our offices, our export offices and our staff, whoever might be interested, to lay down on the line our policy that we favor the neutral body system.

Q. Do you feel that it is conceivable that a neutral body system could be devised containing certain safeguards, due process safeguards, which would be effective to the extent that substantial justice could be done and that malpractices could be brought to light and that action could ultimately be taken which would be of benefit to the trade? A. Why, yes. That is the exact privilege of these proposals that we put forward. That is why we are here. I don't see that it is going to work perfectly, but it

304 is the best that those and myself who work with me —

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354 Q. Mr. Carpenter, do you believe that the neutral body provision of the Trans-Pacific Freight Conference of Japan is, as presently constituted, harmful to the American foreign commerce? A. Yes, I do.

Q. For what reason? A. Because it is grossly unfair, built-in discriminatory provisions. Now, are we going to go back to the basic point?

Q. Perhaps I didn't make my question clear because I said as presently constituted and obviously, it is not presently constituted under

355 Lowe Bingham. A. That is right. I think its lack of procedural safeguards and lack of provisions for what we in this country, at least we lawyers consider a judicial system applying to business, in general.

Q. Has it led to instability in freight rates in that trade, in your view? A. Potential because we resigned and that would probably precipitate a rate war, but we withdrew our resignation when the stipulation was made with the conference that they would not proceed to exact penalties that had been levied. We were on the verge of a rate war which, of course, would have been very, very bad.

Q. Is the trade from Japan to the Pacific Coast currently what you would call a stable trade, stable rates? A. I don't know, sir. I am not a traffic man.

Q. I see. A. It is one of the most highly competitive — I mean intra-conference competitive among the members themselves that I know of. But I cannot qualify as a traffic man. I really don't know that. That is a matter for an economist to say.

Q. Do you believe that the neutral body system which is the subject of this proceeding is either presently or potentially harmful to exporters, shippers, consignees and people in that general category? A. Yes, I think

356 so because when you have unstable conferences you have lack of confidence of the shipping public and of the receiving public which would be here because we are the receiving end of those voyages. We don't have confidence of the shipper or consignee. The businessman doesn't have confidence that the rates are going to remain stable for a period of time.

You do not get the full booking that you normally expect. Now, that is not entirely due to this neutral body business or anything of that sort, but you must remember that these conferences have not had the dual rate system so there are various factors that enter into the situation of these conferences.

What I am saying is illustrated by the fact that there were 9 or 10 Japanese lines and under the prodding of the, or urging of the Japanese Government, they would consolidate into about five to strengthen. But the whole thing is a matter really for a study by an economist, not myself.

Q. Then your answer with regard to stability, your answer with regard to possible adverse effects upon the commerce of the United States is limited to your observation as to stability, is that right, sir?

A. Yes.

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367

REDIRECT EXAMINATION

BY MR. GALLAND:

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Q. Did Lowe, Bingham impose any fines while Docket 920 was continuing? A. Yes.

Q. Were the fines for transactions any different from the one in 920? A. The fines were identical for the alleged offense of not furnishing records.

The first fine, the reason given for it by Lowe, Bingham & Thompson as I recall it was twofold; one for intent to commit a breach that intent having been a request by a shipper for free passage from California to Japan. That is just our receiving a request with no evidence that any free passage was given because we were not given an opportunity of a hearing.

The second ground for that first fine of maximum penalty of \$10,000 was for failure to get access to records. That was the subject. That fine was the subject matter of Docket 920.

369 A year after that, there was an identical fine except for second offense, maximum \$15,000 for refusal to give access to records.

Then there was a fine levied against our affiliate company, Isthmian Line, maximum first offense, \$10,000 for refusal to give access to records.

Q. Thank you. A. Those were successive fines, each one levied at the maximum amounts that Lowe, Bingham was authorized to impose.

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370 Q. How do the comparative requirements for burden of proof compare as between a criminal case and a neutral body case?

371 A. There is no proof at all, let alone burden of proof. This is entirely up to the prosecutor, all rolled into one — prosecutor, judge, jury, court of last resort, ruler upon evidence, no evidence at all, finding a party guilty of a malpractice under the guise of calling it an attempt to commit a malpractice where it has only been a request for free passage.

The Good Lord knows that anybody in the steamship business is usually beseeched for free passage. If that is malpractice, just a request for passage, I guess we would all be bankrupt from suffering

finer. That is the kind of thing I am talking about, not even a hint of malpractice or refusal to give access to records.

We didn't refuse to give access to records. It was the method by which the records should be investigated. The whole thing just shrieks with dishonor to an accused because he is accused and isn't given a fair hearing of any kind.

* * * * *

375 Q. You were questioned I think in yesterday's afternoon session as to various periods of delay for which the States Marine proposals incorporated in Exhibit 5 provide, for example, there is a preliminary 10-day delay in which the accused line can decide whether to nominate its regular auditors to make the direct examination of certain financial records — A. Yes.

Q. And Mr. Warren, I think, asked you whether in that 10-day period the accused might not effectuate some form of cover-up. Do you remember the question? A. I remember the line of questioning, yes.

376 Q. Now, suppose there were no 10-day delay or no delay of any kind as there isn't under the present neutral body rules, and let us say that Isthmian Lines learned that its New York office was accused of a malpractice involving a transaction in Karachi, India, of which the personnel at New York had never heard before.

Now you have some moderate period in which the accused can, itself, make an investigation of the charge. What consequences do you foresee? A. Well, you are helpless to defend yourself, helpless to have any material to show the truth. I think I brought that out yesterday in talking about a complaint in Algeria or Alexandria and it could be anywhere in the world, and if you don't have some period in which you can make an investigation, you are at a loss.

Q. Is it possible that if you didn't have a period in which to investigate that the accusation and the neutral body investigation, such as it was, could eventuate in a penalty before the accused even had opportunity to know what the incident was about? A. Yes. We never did find

out what we were accused of during the matter of the so-called free passage. We got a little information long after the fine was levied to run the thing down.

377 I am not going to go into that because that is probably not germane, but I think we were fined long before I could trace the thing to get any evidence as to whether we did give free passage.

Q. You were questioned yesterday — A. Pardon me. In other words, this is very much like the trial in Alice in Wonderland where the Queen said, "Sentence first, verdict afterwards."

* * * * *

380 Q. Do you regard it as essential to your concept of smooth functioning that the neutral body proceed from accusations to fine with absolutely no slow-down or impediment by way of respecting the rights of the accused?

MR. WARREN: Leading question. I object to that.

THE WITNESS: I would call that more of a tidal wave than a smooth function. No matter what you try to do, here is what I consider orderly procedure for the dual purpose of effective, self-policing with protection of the right of an accused and with basic apparatus of what I consider a fair trial.

Now that all makes up the smooth functioning, if you want to use that word.

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381 Q. Would you feel that a businessman would tend to complain in the open if he felt his vital interest was affected? A. Yes.

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390 Q. What I mean by my question is, do you think a neutral body would be characterized — would you characterize it as ineffective simply because it might have five cases in a row all resulting in acquittals? A. No. It could very well accomplish a perfect purpose of sifting the evidence pro and con in a given case on a given complaint. The court

can be just as effective if the prisoner or the accused is exonerated.

Effectiveness does not mean vindictiveness or flaying of witches like in Salem in the Puritan days. Executions in that sense and effectiveness are not in any way synonymous.

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390

RECROSS EXAMINATION

BY MR. McSHEA:

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Q. Is the neutral body position in the Far East Conference identical with that existing in the Pacific Westbound Conference? A. May I just amend that? There is in those conferences — I beg your pardon? Maybe I can. In those conferences the formula is substantially identical. I think they do have an appeal to arbitrators, but only on the narrow ground that the line complained against, the respondent, may say it hasn't had a fair trial. That is the only ground of appeal. Not on the merits, but whether it is a fair trial, and as long as the chancellor is assured as to what constitutes a fair trial and what doesn't.

Q. Is this in both the Pacific Westbound and the Far East Conferences? A. I think they are substantially identical, yes, in form, and they use the same neutral body, too.

Q. I see. A. Arthur Young.

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401

EXAMINER MARSHALL: Mr. Warren.

BY MR. WARREN:

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Q. Did I understand that your testimony on the Pacific Westbound Conference neutral body system, that you are not entirely satisfied with the Pacific Westbound system? A. I certainly am not.

Q. Did your organization ever propose to the Trans-Pacific Conference of Japan and the Japan Atlantic and Gulf Freight Conference the use and utilization and adoption and approval of the Pacific Westbound

Conference system? A. Will you repeat that? Did I ever propose what?

Q. That the two Japanese inbound trades, the conferences adopt the Pacific Westbound Conference system? A. I think I pointed out to them the paradoxical feature of very much the same members of the — let me say both the inbound and the outbound conferences where the outbound conferences from the United States; that is, Pacific Westbound and the Far East Conference, have a certain neutral body system and the Japan Atlantic and Gulf and the Trans-Pacific Freight Conference of Japan coming inward to the United States, with many, many members the same as in the outbound conference, they resist it. It seems paradoxical to me. If it is a good system, in a person's opinion, going from west to east, I don't see what makes it wrong when the ship's course is reversed from Japan to the United States.

407 And I am quite sure that I pointed out on numerous occasions why don't you take the system that is adopted by the Pacific Far East — by the Pacific Westbound and the Far East Conference? For reasons unknown to me, those objections were not accepted. Those suggestions were not accepted.

* * * * *

409 THE WITNESS: I don't understand your two-thirds part. The two-thirds may be all right for certain phases of rate making and all wrong for changing the neutral party agreement. I definitely object to that, yes. That's what we call the lack of unanimity. I have said many times here in this room the last couple of days why we favor unanimous agreement, unanimous approval, voluntary consent of all the members, and that consent to be evidenced by their own signature and not evidenced by the conference chairman or any body on behalf of the group. We do favor that. And I disfavor anything less. But I have to put up with these the best way I can.

* * * * *

411 Q. Mr. Carpenter, going to another subject, how can the neutral body cause an unstable rate situation? Or was that the purport of your

testimony earlier? A. That is the purport. It's a broad statement. But we tendered resignation from these conferences on several occasions,
 412 the latest last year. And we finally withdrew. And the mere threat of withdrawing created an unstable rate situation, because nobody knew whether there would be a rate war or not. The conferences were about to increase, or file notice of increase of their rates on some commodities. And our resignation, so our Tokyo office told me, threw the whole thing into turmoil and indecision among the conferences themselves.

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419 MR. WARREN: Mr. Examiner, I should like to call as my first witness Mr. McCone and ask that Mr. McCone assume the witness chair.

Thereupon,

420 JAMES F. McCONE

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WARREN:

Q. Would you please state your name, position and company affiliation? A. My name is James F. McCone, M-c-C-o-n-e. I am traffic manager of Pacific Far East Line.

Q. Are you located in the home office of the Pacific Far East Lines? A. Yes, in San Francisco.

Q. Is your company a member of one of the conferences subject to the current investigation? A. Yes. We are members of the Trans-Pacific Freight Conference of Japan.

Q. Are you a member of the Japan Atlantic Gulf Freight Conference? A. We are not.

* * * * *

422 Q. Are you here this afternoon as a conference witness for the Trans-Pacific Freight Conference? A. Yes, sir. At the request of

the conference, TPFCJ neutral body committee, and with the concurrence of my own management, who feels that we have a rather large stake in doing what we can to ensure the formation of a neutral body system in Japan, which, whatever its nature may be, will be successful in eliminating and controlling the malpractice situation in the trade.

* * * * *

423 Q. Under what circumstances was the first neutral body inaugurated in this particular trade? A. It goes back to 1958. And I think I am safe in saying that it was triggered by my principals and American Mail Line, who stated that they would have to review their continued membership in that conference unless the malpractice situation would be corrected.

* * * * *

424 Q. In 1958 I take it there was reason for the member lines to consider that they needed some mechanism for the policing of malpractices, is that correct? A. Yes. That is certainly correct. I don't think at the time anyone had any other view that there was a malpractice situation in existence.

Q. Do you have an opinion as to whether such a situation exists today, since 1958? A. * * * So to sum that up, there is an apparent

425 stability, but I think potential rate instability.

Q. Did you explain why you thought potentially there is a volatile rate situation? A. You said did I explain, or will I?

Q. Will you, or have you? I am not sure that I caught it.

426 A. * * * Not to oversimplify it, but it is an extremely competitive trade. It is — well, I don't know all about all trades, but of those trades that I have familiarized myself with, including some of the Far East inter-port trades, which are pretty wicked in some ways, this trade is certainly as competitive as any in the world, and any time you have a situation as competitive as this without adequate safeguards, you have rate instability.

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428

Q. Mr. McCone, would you please identify the neutral bodies that have operated under Article 25 since the inauguration of the first neutral body to date? A. Yes. Roughly from 1958 until 1963, a period of approximately 5 years, Lowe, Bingham and Thompson was the neutral body, followed in about a three-months' period by Arthur Andersen and Company; and then Arthur Young from, I would say, approximately April of 1963 until the present, about a year and a half.

* * * * *

Q. Why have the member lines selected accountants? Why haven't they considered — they might have, but why hasn't the selection resulted in the selection of some other firm other than accounting, if you know?

A. I believe the reason is this. It is a question of availability and suitability. Now, in Japan you don't have, for example, any large investigative firms; at least, if there are any, I don't know about them. There are these firms such as the ones we have mentioned who exist in this — in Japan, who are available for this kind of work. There is really no one else as available and as qualified. Now, I'll speak about their qualifications.

429

You don't have to be an accountant to be a neutral body. But of any of the skills involved in determining malpractices, certainly accounting is — an accounting, knowledge of accounting is one of the most important.

In addition to these factors, a consideration of whether or not the neutral body existed, say, world-wide, or almost world-wide, or existed in a broad geographical space was important. And these accounting firms, by the nature of their work, do exist in various parts of the world. And that was an advantage to themselves. There was no necessity for accountants. It just happened.

Q. Do you think the international organizational structure of an accounting firm has a bearing upon its acceptability by the conference

as to whether it might be considered as a neutral body? A. Certainly. In addition to which I would like to add one more point. And I just thought of this, and I think it is important.

The firms that we are talking about, such as Lowe, Bingham and Thomson, Arthur Andersen and Arthur Young are firms which in my opinion, are of the highest possible professional caliber. And this is something that is essential in anything as controversial as a neutral body is.

EXAMINER MARSHALL: Off the record.

(Discussion off the record.)

EXAMINER MARSHALL: Back on the record.

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430 Q. Would you relate for the record what you know of the activities, investigations, et cetera, of Lowe, Bingham and Thomson? A. During the period that they acted as a neutral body, I believe they examined 23 complaints and made 9 assessments. I may be one or two off there, but I think that's right.

* * * * *

432 Q. Do you have knowledge as to whether these assessments were against foreign lines as well as against American lines? A. They were against foreign lines and American lines, including Pacific Far East Line, who had two, States Marine-Isthmian, and a range of foreign lines.

Q. Your own company was assessed by Lowe, Bingham and Thomson? A. Yes, sir.

Q. Two times? A. Twice. \$10,000 each time.

Q. Would you please, Mr. McCone, relate the activities of the next neutral body to which you alluded, Messrs. Arthur Andersen and Company, as far as Trans-Pacific Freight Conference is concerned? A. I believe they examined three cases in the three months that they were the neutral body. I don't believe they made any judgments or assessed any lines. And as far as Arthur Young is concerned, so far as I know, they have made no assessments.

MR. GALLAND: Do you know how many cases they have had?

433

THE WITNESS: I don't recall off-hand, Mr. Galland.

* * * * *

Q. Do you have an opinion as to whether or not the establishment of the neutral body system consisting of Messrs. Lowe, Bingham & Thomson, Arthur Andersen and Arthur Young has benefited this trade?

A. In my opinion, to some extent; which is hard to identify, but which I am sure exists. The answer to that is "Yes," there has been benefit.

Q. Would you please give us the basis of your opinion, if you have any? A. Personally, I feel there were two things resulting from the fact that there was a neutral body that were effective in operating against malpractices in the trade. There was a deterrent factor. We as a line were very aware of the importance of not being fined. The deterrent factor in effect was increased by the fact that the investigation could be a surprise investigation. And nobody likes to get surprised when they can't afford to be.

434

Therefore, I am certain that not only my own principals, but others necessarily changed practices which have existed in the past and which probably had been acceptable practices. So the deterrent and surprise factor was quite important there. There may be others. At the moment that is all I have in mind.

Q. Did I understand you to say that since the inauguration of the neutral body system down to the present time, you were able, or your company was able, your organization, to adjudge in the trade some degree of difference which might cause you to believe the neutral body was working or not? A. This was evidence to the fact that it was working. Now, a lot of my colleagues are — the conferences probably don't think — feel as strongly as I do about this. But I think they all agree that there was improvement. I think there was considerable improvement.

* * * * *

Q. You referred to two assessments against the Pacific Far East Line. Were these assessments paid? A. Yes, they were both paid.

Q. Do you know the reason for the imposition of assessment initially? A. Yes, I do. I was not — well, I was in Hong Kong at the
435 time, and I only say that because I want you to know that I am speaking from knowledge gained later on of the facts of these cases. But my knowledge is accurate, I am sure.

The first fine was levied as a result of our refusal to give access to records. And the second was assessed on the practice that the neutral body was investigating when we refused them access to the records the first time. So first we would not show them the records, and then, when we did, they adjudged us in violation.

Q. Do you regard the amount assessed for the refusal of access as reasonable or unreasonable? A. Well, I would like to say that our action — this is a very technical matter, or it was a very technical matter. It was controversial in our own management as to what we should do. Because this was not a witting malpractice; it was a procedure that we had set up which was very complicated and which some people thought was wrong. Some of the others thought it wasn't.

So when we were fined for refusal of access to records, I don't think we could object to that at all, because we did refuse them access.

Now, the fine for the violation, frankly, I think was a little bit high. But we paid it anyhow. It was \$10,000. If it had been five, it would have had just as salutary an effect on our desire to change it as the

436 \$10,000 did, and it would have saved us \$5,000. But we paid it nevertheless.

Q. Do you see any reason why a fine or an assessment of liquidated damages, as we call them, for refusal of access might be more than what the actual malpractice is? A. I think in general refusal of access is a more serious thing than most of — most but not all — many but not all of the malpractices.

Q. * * * In the first paragraph, Hearing Counsel has made a suggestion that the accused, the respondent, should be disclosed all of the evidence prior to a neutral body determination. Do you have an opinion regarding this? A. Yes. Now, there is, on the surveys there would appear that this is quite logical, to someone unfamiliar with these trades. But, in my opinion, that is unacceptable, because there are times when the nature of the data would identify the accuser.

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437 Admittedly when showing this evidence would not damage anybody, it would be all right. Therefore, we prefer to leave the decision as to how much, if any, or all of the evidence be shown to the respondent as a responsibility of the neutral body.

* * * * *

Q. Mr. McCone, looking at paragraph 3 of Exhibit 10, Hearing Counsel has raised the question as to whether or not there should be appeal by arbitration from the neutral body's determination. Do you
438 have an opinion regarding this? A. My opinion is that arbitration is unnecessary, weakening to the system; it would cause delays in making the determinations; it would be an unnecessary possible loop-hole.

Now, I hope sometime in this testimony I will be able to say that I share Mr. Carpenter's views about — I am no lawyer — but about Anglo-Saxon law and the fact that accused should have all rights, and so on. I do except in this situation. I feel strongly — I hope you understand that.

* * * * *

439 Q. Do you agree that the identity of the accuser should be disclosed? A. No, sir.

440 Q. Why not? A. Because the identity of the accused will be disclosed, there will be, I would almost say, no accusations. I will say almost no accusations.

* * * * *

Q. On what do you base that judgment or opinion? A. Well, may I — I don't want to waste a lot of time, but I like to be very specific about it because if we agreed to this, I would be the one to whom it would be proposed by the conference in Japan that we enter a complaint against somebody. It would be up to me to tell then whether to do it or not. And I cannot visualize a situation — there may be a view, but I cannot visualize one — wherein we could complain against a competitor without hurting ourselves or facing the risk of hurting ourselves with shippers to a point where we would dare make the complaint.

You cannot go around breaking shippers' rice bowls and get away with it. It puts you in an impossible position.

Q. Do you have an opinion as to whether this is the view of a majority of your member lines in this conference? A. As far as — and I think I'm right — it is the view of every line except States Marine-
441 Isthmian.

* * * * *

Q. States Marine has also proposed in regard to the neutral body system it would like to operate in this trade as reflected in this exhibit, that a complaint should be filed with the accused immediately, promptly, upon that complaint being filed by an accuser with the neutral body.

A. Yes. And would that — this is not — I don't have to know this to answer the question, but would that also include the identity of the accuser? It doesn't matter too much.

Q. As they have indicated, it would, under their proposal, the identity of the accuser and the identification of the specific charges involved. A. Well, if that was done, the accused line in many cases could hide any action which they had taken which was in violation. This eliminates secrecy.

Please understand that this trade is a — this is just how competitive this trade is. It may be hard to believe that unscrupulous lines

would do this, but the danger is there.

Q. Would your company prefer the establishment of a neutral body that is completely unconnected with a member line over a connected
 442 kind of neutral body? A. * * * The decision as to who is going to be the neutral body rises or falls on our evaluation of his ability and has no reference to his other activities as long as they are known to us. And frankly, to me that isn't too important.

* * * * *

Q. Is it your opinion that this is the view of the conference? Are you speaking that this is the view of the other member lines? A. Yes, sir. Excuse me; it may not be unanimous, but it is certainly the view of the preponderance. It is more than two-thirds.

* * * * *

443 Q. Do you have any knowledge as to whether any of the firms you have mentioned are connected or have a financial interest in any member line? A. I don't believe that Arthur Young or Arthur Andersen do, but I am pretty sure that most of the rest do. Most, if not all, of the rest.

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444 Q. I think you mentioned that Arthur Andersen, in your opinion, according to your knowledge, does not have a relationship with a member line in the sense of serving it as regular auditors? A. I believe that's the case.

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Q. Do you have knowledge as to whether or not the conference could consider that company as an alternative prospect? A. Could consider them, yes. Whether they are available or not, I don't know.

445 Q. Do you have knowledge as to whether or not they might be available? A. I doubt that they are, because they ceased being the neutral body at their own — it was their own decision. I assume they are not available for the reasons that caused them to resign.

Q. What do you think about States Marine's proposal which would inject their own regular auditors in between the neutral body and the accused line? A. Well, I think it would, under the circumstances that they propose it, eliminate surprise. And I think it is wholly unnecessary. And — well, wholly unnecessary, period.

Q. Is this the opinion of the other conference members? A. I believe it is.

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449

Federal Maritime Commission
Room 147 Centennial Building
1321 H Street, Northwest
Washington, D. C.

Thursday, October 22, 1964

* * * * *

489 Q. Article 10 provides for arbitration. Why shouldn't Article 25
provide for arbitration? A. Because there is a difference there between
490 the matters being dealt with by Article 25 and Article 10. Article 10 is,
as I say, directed more at controversies rather than the fact of a mal-
practice or the fact of no malpractice. An issue such as a controversy
is necessarily less clear in terms of proof than the existence of a mal-
practice; that therefore we felt that arbitration was not damaging to it,
not weakening.

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492

CROSS-EXAMINATION

BY MR. GALLAND:

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MR. GALLAND: Well, let me explain that.

States Marine thinks there ought to be one policing system and not two. We will argue that there is overlap between Article 10 and Article 25. Article 10 provides for the punishment of breaches under its terms. Article 25 provides for the punishment of breaches under its terms.

* * * * *

514 Q. * * * Tell me why arbitration would not be at least as good there. A. Because arbitration weakens the effective ability of a neutral body to exercise its functions as visualized by the conference.

* * * * *

515 Q. It weakens the authority of Lowe, Bingham and Thomson, say, as neutral body in what respect? A. Well, as I think I testified earlier, it weakens it by inserting a possible loophole — strike that — a possible opportunity for getting away with — I don't like to put it that way — a malpractice through the avenue of arbitration. Arbitration is a procedure — and I don't speak as a lawyer, again — which can, by definition I think, reverse a decision of a neutral body. Thereby, it weakens the deterrent — it weakens the deterrent aspect of the neutral body. Any time you have

516 arbitration available to you —

* * * * *

521 Q. Now let's get back to your assumption that arbitration, at least as applied to neutral body proceedings, is a factor that weakens neutral body discipline.

Is your conclusion that arbitration is a weakening influence based on the assumption that the arbitrators will tend to water down the punishment meted out by the neutral body? A. No. It is based on, not on the assumption that it would do so, but on the possibility it would do so.

522 Q. Cannot that possibility work just as well in reverse? You have cited that in some of your exhibits, instances where the neutral body dismissed complaints, and if the complainant or conference were dissatisfied with the dismissal, would it not get a second bite off the apple if it had the right to go before arbitrators and to claim that Lowe, Bingham and Thomson misbehaved because it was auditing the books of the accused line? A. Yes, but that's — that is a much smaller apple than the other one.

Q. Why do you say that? A. Because I believe it's true.

Q. What experience do you have that indicates it is true, Mr. McCone? A. Well, I don't know what experience I have in the case that — I made that statement on the basis of logic more than experience.

Q. Have you ever known of any situation in which any neutral body decision has gone to arbitration? A. I can't recall of one off-hand.

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Federal Maritime Commission
Room 114 Centennial Building
1321 H Street, Northwest
Washington, D. C.

Friday, October 23, 1964

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532

JAMES F. McCONE

resumed the stand and testified further as follows:

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533

CROSS-EXAMINATION (resumed)

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Q. So what you were saying in effect was that it was twice too high. I am asking you what your objection is to a set of restrictions or a set of guidelines for the neutral body's guidance that would assist the neutral body in coming out at a fine that is just right, rather than a fine that is twice too big. A. Oh, all right.

Q. Do you object in principle to such a set of guidelines?

555

A. Well, the fine that we are talking about is a fine against Pacific Far East Line. I am more concerned about having a strong system to police other people with. Pacific Far East Line has no — has a policy which is not to commit any malpractices. Some of our competitors may not have a similar policy.

I would agree with a system of extremely high fines, because it is not Pacific Far East Line's problem, it is a problem of those lines who are —

Q. Well, now — A. — who are in a position to malpractice.

Q. We will come back to that.

But, at any rate, Pacific Far East Line, despite the high moral plane on which it presently functions, did get caught in the switches twice in fairly rapid succession for \$10,000 apiece, is that right? A. That is right.

Q. At least that is the adjudication by the neutral body, isn't that correct? A. That is correct. We accepted it.

Q. So that Pacific Far East Line, as far as its history is concerned, does not operate in an atmosphere of such absolute purity that a sharp line of distinction must always be maintained as between it and everybody else in the conference, isn't that true? A. I don't know if it is true or not.

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MR. McSHEA: Would you mind rephrasing the question?

MR. GALLAND: All right.

BY MR. GALLAND:

Q. Anyway, Pacific Far East Line is the line that twice got fined in the neutral body system, and the aggregate fine of the Far East Line was bigger than the aggregate against anybody else, with the exception of States Marine in the LBT episode, is that right? A. Those facts are correct, yes.

Q. O.K. Now, you say the fine was twice too high, but it is all right to fine the Pacific Far East Line twice too much in the hope that other people will be fined twice too much? A. I didn't say that.

* * * * *

561

Q. Will you turn, please, to the bottom of page 8 of Exhibit 25?

A. Yes.

Q. That is paragraph (m), Criteria for Fines:

"The neutral body and arbitrators reviewing its decisions shall impose or decline to impose fines with due regard to the nature and gravity of the violation involved."

Taking it that far, does that strike you as an unreasonable precept? A. No.

* * * * *

Q. Then it continues:

"Taking account particularly of the following considerations:

"(1) Whether the violation was innocently or purposefully committed."

Does that seem to you an irrelevant stand? A. Does it seem irrelevant? No, it seems relevant.

Q. That, I gather, is what you had in mind when you pointed out on page 435, "because this was not a witting practice." You meant that
562 you had not done it on purpose, is that right? A. Well, we were doing the practice on purpose.

Q. But you didn't know it was wrong? A. We didn't consider it wrong.

Q. Right. The second consideration is, "the number of previous violations of the same or related type by the accused line." That is not so bad, is it? A. No.

Q. In fact, the conference agreement itself takes account of repeated infractions because the maximum goes up — A. Yes, sir.

Q. — as the succession of offenses was continued, isn't that correct? A. That's correct.

Q. The third standard is "the financial importance of the violation to the accused line and to his shipper, consignee, competitor or other affected interest."

Is that something that ought not to be taken into account?

A. Well, this is States Marine's proposal, Mr. Galland.

Q. I understand that. I am trying to find out whether you think it is good or bad. A. Would you like me to comment on that?

Q. Yes. A. On that paragraph 3?

563 Q. Yes. A. It doesn't make any sense, in part. When you fine a line, it doesn't have any effect on the shipper or consignee or competitor, as far as I can see.

Q. No, that is not what three says. Read it carefully. A. "The financial importance of the violation to the accused line and to its shipper" — oh, I see — of the violation." Okay.

Q. Right. A. That makes sense. It's a good guideline.

Q. How about number 4, whether the violation substantially offended the spirit of the conference agreement or was merely technical." A. That makes good sense.

Q. "(5). Whether the violation of the conference agreement also constituted a violation of law." A. I don't have an opinion on that.

Q. Six: "The fines or penalties customarily imposed by courts for offenses of comparable type and importance." Does that seem a rational standard, not necessarily to be followed slavishly, but just to be taken into account, to be given consideration? A. I would not describe it as particularly rational. The reason I feel that way is: Keep in mind we are dealing in international trade. I assume, without knowing, based upon —

564 well, I assume, without being certain, that different courts in different countries have thoroughly different practices in terms of fines and penalties.

Q. I would assume that might be true and might not a neutral body sitting in Japan give at least some heed to the seriousness of a particular offense under the Japanese concept as measured by the expressions of its courts as the official administrators of Japanese justice? A. Well, I think this is — my opinion is unimportant, but I think this is a rather difficult guideline to identify.

* * * * *

565 Q. * * * And let's say that the law imposes a penalty of a fine up to \$5,000 for that infraction. Do you think that it does any harm for the neutral body to know that fact when it is assessing the gravity of a comparable offense? A. I don't think it does any harm. I don't know that it does much good.

Q. Might not knowledge of the fact at least assist the neutral body when adjusting the scale of its penalties to the general range that represents the official expression of community sentiment about like or comparable offenses? A. It might.

Q. At any rate, you don't see that knowledge of this fact either as to the state of Japanese law or American law or Okinawan law or the British Columbia or other law could taint the finding of the neutral body in any way, do you? A. I can't imagine it would taint it, Mr. Galland.

Q. The last of the standards listed is "whether a fine or penalty has been imposed or paid by the accused line for the same violation in a criminal or civil proceeding." Do you think that is a relevant consideration? A. I frankly do not have an opinion on that.

Q. Well, let's see where you can develop one, Mr. McCone.

EXAMINER MARSHALL: See what?

BY MR. GALLAND:

Q. Let's see whether you can develop an opinion on the basis of a hypothetical case. Suppose we assume once more the facts that I gave you a moment ago, just changing the direction of the transaction from westbound to eastbound. Assume again you were accused in the United States Court in California of having committed an unjust discrimination and you were fined \$5,000. You would regard that fine, I assume, as something of a deterrent, would you not? A. Yes.

Q. And if the neutral body came to consider the same case, would you not think it proper for the neutral body to know that you had already been brought under at least some measure of deterrent and possibly a complete deterrent by the payment of a \$5,000 fine under the sentence of a United States Court? A. Well, I have, thanks to you, Mr. Galland, I have developed an opinion on this.

I would prefer that the neutral body make the judgments with absolutely no reference to any other fine that has been paid for the same violation.

Q. Well, you think the fact that you already may stand fully deterred by the punishment of a United States Court is no reason why the neutral body shouldn't go ahead and deter you all over again as if this were a case of first impression? A. If I could be sure that complete deterrence would exist in every case, then I would agree with No. 7. I am not sure it would have.

Q. No. 7 doesn't ask the neutral body to conclude that previous punishment — A. It tells its considerable —

Q. — imposes complete deterrence, does it? A. No. No.

Q. But if the neutral body knew that a carrier had paid a fine and perhaps a series of fines for the same transaction or group of transactions, then with that knowledge couldn't the neutral body determine a little better how much total punishment would be necessary all told
568 in order to add up to the necessary deterrent?

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MR. GALLAND: To begin with, the neutral body at the present time does not operate under any statute of limitations at all. It may be investigating episodes five years old.

MR. WARREN: At the present time?

569 MR. GALLAND: Under even the most conciliatory — under the conference's highly conciliatory position at the moment, they are willing to have a statute of limitations of two years.

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571 THE WITNESS: The key verb there is "could," I think. And it's probably accurate.

* * * * *

575 Q. Now, the range of human activity to which the protection of Anglo-Saxon law extend are pretty broad, are they not? A. I believe so.

Q. Murder, bank robbery, rape, rebating? A. In that order?

Q. Approximately that order, yes.

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577 THE WITNESS: Well, I think I can answer the question by saying that due process, in my opinion, is essential in society but not in a voluntary organization.

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BY MR. GALLAND:

Q. How voluntary is membership in most conferences? Let's say the Pacific Westbound Conference. A. It is completely voluntary.

578 Q. Does the Pacific Westbound Conference have a dual rate system? A. Yes, sir.

Q. Does the Trans-Pacific Freight Conference of Japan have on file an application for leave to inaugurate the dual rate system? A. They do. They do not have the system, as your question suggests.

Q. That's right. Do you think that if such a system is enforced, the membership in the conference is totally voluntary? A. Yes, sir.

Q. If a conference has that system in force, is every line as free to resign as it would otherwise be, considering the effect of the resignation in economic terms? A. No, sir.

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581 CROSS-EXAMINATION (Resumed)

BY MR. GALLAND:

Q. I would like you to have Exhibit 5 in front of you for a little further questioning on it.

On Exhibit 5, Mr. McCone, item E-1 includes the direction to the neutral body that a complaint not be entertained unless it sets forth facts in sufficient detail to apprise the accused line of the specific violation. Does that seem bad to you? A. Yes, it does.

Q. Do you contemplate that the accused line should have any means of defending itself against an accusation? A. Not necessarily, no. I would necessarily have some opportunity or it might necessarily have some opportunity during this investigation.

Q. Is your answer "not necessarily"? A. Yes.

* * * * *

589 Q. Well, my concept of preliminary investigation meant anything that would be preliminary to hearing. Apart from the question as to just how far along in the initial investigatory stage the hearing is held, do you object to having some kind of a hearing at any stage of the proceeding?

A. My position would be that the so-called hearing — and I say that because it is possible we are thinking of different things when we use the same word — should come at a point which is hard to define, admittedly, but should come rather late in the game.

* * * * *

636 Q. Your objection to confrontation, hearing, cross-examination, appeal and all the rest of it is due to the fact that you think it would interfere with the prompt assessment and collection of fines, isn't that right? A. Yes, partially. But yes.

Q. Now, from the beginning of the regime of Arthur Andersen down to the present, isn't it true that in this conference, the TPFCJ, there hasn't been one fine that those protective provisions could have impaired?

A. If your statement is to the effect there has not been a fine, that is correct.

637 Q. That's right. And if there has not been fine understanding to the wide open system you have got, the program could hardly have ^[cost] caused the conference anything much if there had been a set of due process provisions of the kind that States Marine is advocating?

MR. WARREN: Objection. Speculative, vague.

* * * * *

638 Q. On page 44, you testified that it would be bad to give a complaint to the accused because, if that was done, the accused line in many cases could hide any action which they had taken which was in violation.

Now, in the case of Pacific Far East, that is not what happened, is it? A. You mean in the case we were fined, wherein we were fined?

Q. That's right. You were first asked for your records, and you did not produce them, and after you had \$10,000 worth of discipline for

taking that position, you did produce them, and the neutral body found a violation; is that right? A. Correct.

Q. So that notice of what they were after did not prompt your company to go build a bonfire? A. It didn't. But it could have.

* * * * *

639 Q. Right. So your fear on page 441 was that the unscrupulousness of the unscrupulous might prompt them to destroy evidence, destroy or remove evidence that might be needed to prove a charge; that is what you were saying, isn't it? A. I agree with that.

Q. Now, if a line is sufficiently unscrupulous, Mr. McCone, to destroy evidence to defend itself from a charge, what assurance has anybody that the same unscrupulous line would not fabricate evidence to prove a charge if it felt like bringing one before a neutral body for competitive or other reasons.

* * * * *

640 EXAMINER MARSHALL: That is a perfectly reasonable question. However, I think that, again, is one of those things that you can argue on brief without a showing of any kind in the record. Because it just is so undeniably a fact.

MR. GALLAND: All right, sir.

EXAMINER MARSHALL: It is as certain as tomorrow's sunrise that, if you have any capacity for unscrupulous actions, that any reasonable person would assume that it can work both ways. It can work as a vindicative thing against competition or to gain an advantage in any way at all.

I think the witness can answer, if he has any thoughts. But I would not dwell on it too long, since I don't think he need be —

MR. GALLAND: Since I can't do any better than convince the Examiner, and since I seem to have convinced him of my point on this, I won't press it.

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Federal Maritime Commission
Room 114 Centennial Building
1321 H Street, Northwest
Washington, D.C.

Tuesday, October 27, 1964

The above-entitled matter came on for further hearing, pursuant to recess, at 10:00 o'clock a.m., before JOHN MARSHALL, Examiner.

APPEARANCES:

As heretofore noted.

WILLIAM JARRELL SMITH, JR., ESQ., Associate
Hearing Counsel, Federal Maritime Commission.

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JAMES F. McCONE

resumed the stand and testified further as follows:

REDIRECT EXAMINATION

BY MR. WARREN:

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Q. Mr. McCone, the question on cross-examination was asked by the Examiner why, or did you know why Arthur Andersen no longer serves as a neutral body. I think you said that you had no direct knowledge or reasoning. Do you have anything further to say about this? A. Just this, that there was naturally speculation and conversation as to the reasons for their resignation at the time it happened, and the discussions I heard were pretty unanimous in their sentiment that the reason they resigned was that it had become so unpleasant for them and potentially damaging to their business interests to continue as the neutral body with Docket 920 and various litigation going on with regard to the neutral body system.

I doubt that anyone knows for sure except Arthur Andersen's own people, but that was the gist of what was said at the time.

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THE WITNESS: I believe in my earlier testimony I used the term "referee" as an example of what I thought a neutral body should be. Now I don't think that a prosecutor is a referee. The neutral body has the responsibility to investigate both sides of any case and there is no onus

on them to seek proof of malpractice more than there is for them to seek proof of a lack of malpractice.

674 Therefore, I feel rather strongly that the word "prosecutor" is incorrect. In other words, the neutral body is an open-minded entity charged not with looking for violations or proving them, but charged with determining the facts on both sides of an individual complaint and coming up with the truth without reference to anything but the truth.

* * * * *

676 A. Well, the neutral body system, in my judgment, incorporates into it the same concepts as arbitration. The neutral body is fair and impartial and to introduce arbitration of a finding by them would merely duplicate the process that they have already gone through in making their own judgment and is, therefore, unnecessary.

I might just also say that the people constituting the neutral body are certainly of just as high repute as any arbitrator would be and, in fact, better qualified to arbitrate an individual case than the usually-constituted arbitration panel; at least we in the conference are satisfied that this is the case, with the exception of States Marine and Isthmian Lines, who disagree with us. Only States Marine and Isthmian disagree.

* * * * *

681 BY MR. WARREN:

Q. At page 581 of the transcript you said that the accused should not necessarily be given a chance to defend himself. Would you clarify that answer? A. I think in context I was speaking of at a certain point. We agree that a hearing where the accused is allowed to rebut the facts, if he can, should exist. My point is they should not be given an opportunity so early in the procedure as to hamper the neutral body's ability to make an investigation.

In other words, we think that toward the end of the investigation when the facts are in the neutral body's hands, then obviously the accused should be allowed to rebut the evidence if they can, but not real early in the game which I believe was States Marine's preference.

In other words, it should not be so early as to neutralize the surprise element.

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RECROSS EXAMINATION

BY MR. GALLAND:

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Q. Now, in your redirect examination, you indicated various reasons for rejection in the Transpacific Conference of some of the Pacific Westbound neutral body safeguards. Is it true that those two conferences, Transpacific and Pacific Westbound, do have substantial numbers of common members? A. It is true, yes.

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MR. WARREN: Yes, I call Mr. Alex C. Cocke.

Thereupon

ALEX C. COCKE

was called as a witness and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WARREN:

Q. Would you state your name, position, and company, for the record, please? A. Alex C. Cocke, Vice President, Lykes Bros. Steamship Company, Inc., headquarters 1300 Commerce Building, New Orleans, Louisiana.

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Q. Is Lykes a member of one of the conferences involved in this proceeding? A. Lykes is a member of the Japan Atlantic Gulf Freight Conference.

* * * * *

733

Q. Are you here this afternoon as a conference witness? A. Yes, I was asked by the Neutral Body Committee of the Japan Atlantic Gulf Conference to testify in its behalf.

* * * * *

A. Lykes Bros. for the years, I would say 1950 to 1959, did not have a regular, homeward service from Japan to the Gulf. We only operate to and from the Gulf Ports because of the fact that there was in existence a rate war and the commodities that moved to the Gulf were not, you might say, highly manufactured commodities at that time, consisting primarily of steel, plywood, and some very low-rated commodities, and the rates were so low that we did not inaugurate a regular service until about August or September of 1959, which was partially due to my visit to Japan in January and February of 1958, and the fact that there were indications we would have a neutral body or self-policing body that would, at least materially curtail the policing arrangements or malpractices that were said to exist, and were existing in Japan.

734 Also, another reason for proposing and wanting a very strong neutral body, one that was unbiased, one that would ferret out these matters, or attempt to, was the severe criticism of the conferences by the Celler Committee in 1959, 1960 and a part of 1961.

* * * * *

734 THE WITNESS: *** It was talked about in the Hakone meeting in March of 1958. It was talked about in subsequent meetings and finally resulted in the neutral body and the appointment of Lowe, Bingham, and Thomson as the neutral body.

735 BY MR. WARREN:

Q. Was the adoption of existing Article 25 the result of the Hakone meeting of which you spoke? A. It was the result of the Hakone meeting.

* * * * *

736 Q. Is the trade which you are concerned with in your testimony
737 this afternoon, can it be categorized as a competitive trade?

A. It is very highly competitive, both as far as members of the conference are concerned and also with respect to the long-lived, you might say, outside competition.

Q. Would you name some of the non-conference lines that are involved in this trade?

EXAMINER MARSHALL: What did you mean by — excuse me for interrupting — by long-lived outside conferences?

THE WITNESS: Those that have been in existence for a number of years like your poor relatives who always seem to be with you.

You have a number of lines that have been non-conference lines and still are.

* * * * *

738 Q. You also spoke of another element; namely, competition within the conference I believe you said. A. It is very keen competition. There are a number of lines that serve both the Gulf in which we are interested in and serve the Atlantic. They are out to get as much cargo as they can, and so are we.

The competition, while you might say it is friendly competition, including my good friend State Marine Lines, we are all out to get what we can on an equal and equitable basis.

* * * * *

740-A Q. Why did Lowe, Bingham and Thomson cease to function as a neutral body in this trade? Do you have any knowledge of that? A. ***

741 They resigned because the neutral body in their opinion was more or less hamstrung as a result of the litigation and Docket No. 920.

* * * * *

Q. How about Arthur Andersen? Why did Arthur Andersen leave? A. I understand Arthur Andersen, after three months, resigned for the same reason.

* * * * *

742 Q. Do you have any information as to the activities of Lowe, Bingham and Thomson as it began to function and did function in this trade?

743 A. Yes, I do. During the period that they started operating, either late 1958 or 1959, through, until they resigned, they had a total of 23 cases in the Japan-Atlantic Gulf Freight Conferences.

The information is that they assessed penalties against 4 of the lines, the penalties were for 3 cases, \$2,000 each, and \$10,000 for another case.

When they resigned, there were 5 pending cases which went out of the window when they resigned, and there were 14 cases in which they found there was not sufficient evidence to submit to call for any fines.

Q. These 4 assessments of which you spoke, were these only against American Lines? A. No, as I understand it, based upon the information we received over the years, the 2 foreign lines involved — 2 foreign lines were involved and 2 American-flag lines.

Q. Were these 4 assessments refunded as a result of Docket 920, or do you know? A. They were refunded as a result of Docket 920, to the 4 lines involved.

Q. Then, for the 3-months period in which Arthur Andersen came into the picture, do you have any information as to their activities?

A. Yes; based on information that we received there were 3 cases involved. The number 1 case was nolle prossed, so to speak. They didn't consider there was sufficient evidence.

* * * * *

747 Q. My question, Mr. Cocke, was is there a distinguishing feature in both systems, existing Article 25 and proposed Article 25 which might account for the effectiveness of the neutral body system in these trades, in a particularly distinguishing manner? Do you have any such in mind?

748 A. ***On the other hand, I think it is fair to all concerned. The neutral body is, in my opinion, neither positive nor negative. It takes the case as it comes up and lets the chips fall where they may.

* * * * *

749 Q. Would you comment on paragraph No. 2? A. As far as we are concerned I would say that the neutral body that has the qualifications of those that we have had, I don't believe the neutral body should be disqualified except where it might represent the accused.

I think then he should excuse himself, but generally speaking if we accept a new neutral body and he is qualified, I see no reason to say that he cannot act only unless he acts for the accused.

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753

BY MR. WARREN:

Q. Why, Mr. Cocke, if the identity of the accuser were revealed in terms of the trade, your experience in the trade specifically if you can do, what possible damage would this do? A. Well, it would have considerable damage. It would get back to the shippers or the receivers involved and would materially, adversely affect the line, all lines involved.

Q. Would Lykes Bros. subscribe to a neutral body system if the accuser's identity were required to be revealed? A. We would not, and that is another reason why we are so opposed to arbitration because the accuser would be revealed in an arbitration. I think it destroys absolutely the good effect the neutral body would have. I don't see how else he can consider it, frankly.

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Q. ***

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Now, if that is true, that appears to be Mr. Carpenter's opinion, if the identity of the accuser were revealed, do you believe that the member lines would file complaints? A. I think they would be few and far between.

Q. Can you conceive of any member lines doing so? A. Very few, if any.

Q. Would Lykes Bros.? A. I don't think we would. It all depends on the circumstances, but I doubt whether we would or not, because we would feel that it would materially hurt us in the trade.

Q. Concerning Exhibit 5, the States Marine proposal, one of the proposed revisions indicates that promptly, a complaint once filed with the neutral body, shall be filed with the accused and of course I am leaving aside the fact that the complaint will identify the accuser and the

nature of the charge, but my question is directed to really the fact of the accused promptly receiving a copy of the complaint.

Do you see anything wrong with this? A. I don't like that at all. I think that the neutral body appointed for a definite reason should make the investigation and then ask the accused if they want this hearing referred to in our proposal and then be heard with his lawyers and or not his accountant. I wouldn't agree to his accountants, but with his lawyers, yes.

758 Q. Well, Mr. Cocke, why would you not agree to the turning over such complaint promptly upon the time that, or at the time that the complaint is filed with the neutral body? A. Because it gives the accused too much time to you might say counteract the evidence in documents, and what have you.

* * * * *

759 Q. Do you know what the availability in the Far East is of international-type concerns that might qualify as a neutral body? A. Well, from my experience and knowledge of it, I think they are very limited, indeed. We have had 2 — Lowe, Bingham and Thomson. We have had Arthur Andersen, and now we have Arthur Young. There are probably only one or two left, and I certainly hope that we can keep the people we have. I think they are good people, but if we lose them, and we get down to the bottom of the barrel, so to speak, I don't know where we
760 are going to go.

* * * * *

761 EXAMINER MARSHALL: ***Mr. Cocke, in your judgment, is the accounting expertise of these CPA firms material to the job to be done in evaluating and judging the malpractice situation? Do they, in some substantial portion of the cases involved, use computations and the use of figures and the type of capability that falls within the capability of an accountant?

THE WITNESS: Well, I think it is very helpful. I don't think it is the entire answer to it, but I would say this: Of all the people you could

get, I think they are the best equipped to do it with their over-all and general experience. I don't know anyone else you could get that could do a job up to our way of thinking.

* * * * *

766 Q. Under proposed Article 25, refusal of access to documents, refusal to the neutral body of access to documents, is made a specific breach under the language of the proposed article. Do you have any views as to whether or not this is a good idea? A. I certainly think it is a good idea because the guts of the thing is the production of — the access to the records.

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770 Federal Maritime Commission
Room 114 Centennial Building
1321 H Street, Northwest
Washington, D. C.

Wednesday, October 28, 1964

* * * * *

777 BY MR. WARREN:

Q. Do you have any views on whether these liquidated damage maximum assessments, or possible assessments, are too high or too low or what? A. I think in view of the intent of the conference, intent of the law, that these so-called assessments are fair and reasonable.

Q. Why do you say that? A. Well, Mr. Warren, they could be violations which would involve a great deal of revenue and for that reason I would say that the assessment should be in keeping with what might happen.

I envision that you could possibly, to repeat, have very heavy violations entailing a lot of revenue, and these fines could be very reasonable.

778

I would like to point out that it says a maximum of \$10,000, and leaves it to the discretion of the neutral body, based on the facts developed, as to what to assess.

I pointed out that I had knowledge in the Japan-Atlantic Gulf Conference of four fines assessed by Lowe, Bingham and Thomson where 3 were for \$2,000 and one was for \$10,000, which shows that they did use discretion in assessing fines.

* * * *

779 Q. Mr. Cocke, can you conceive of how it might be profitable to rebate or to commit a malpractice and get caught, even if you have to pay the assessment? A. Yes, there is a possibility of that.

* * * *

791 Q. As a matter of clarification, do you have an opinion as to whether it is desirable or not for a neutral body, whoever he might be, appointed in this conference to be a neutral body with international connections?

A. I think it is very advisable to have a neutral body with international affiliations or international subsidiaries or connections because if there happened to be a malpractice say in Japan or in the United States, the payoff could be in Zurich, Switzerland, or it could be in Hong Kong or

792 Timbuktu.

If a line, and I don't believe and I hope there are not too many of them does have a malpractice, they are certainly going to try to cover up. They are not going to come out openly and do it. They are going to cover up to the best of their ability.

Another feature is you can talk about this intermediary auditor or the auditor of the accused. Just to think of a conference that has American lines in it. They have Norwegian lines, Swedish lines, Japanese lines, Philippine lines and others.

Now suppose one of those five lines domiciled in a foreign country decides they want their own auditor. Well, you are certainly going to go far afield in getting this intermediary auditor.

I think for that reason that that should not happen, one of the reasons.

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CROSS-EXAMINATION

BY MR. SMITH:

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Q. Is it fair to say, Mr. Cocke, that the evidence of a violation of the conference agreement would be found in the books of the steamship company that has been accused of the violation? A. In the books?

Q. Yes. A. Not necessarily.

Q. It wouldn't necessarily, but it would more commonly be found there, wouldn't it? A. It wouldn't necessarily have to be on the books. It could be a transaction out of the books, covered up in the books.

Q. But in any event, it would be found in some records that were controlled by the line? A. In some records, but possibly disguised so that you could not determine what it meant.

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Q. As a practical matter, wouldn't the accused be presented with all the evidence offered against him except the name of the complainant?

MR. GALLAND: I object to this on the grounds that the witness cannot know. The neutral body can do what the neutral body wants to do and they don't ask Mr. Cocke what they are supposed to ask for. I don't think there is any proper foundation for that question.

EXAMINER MARSHALL: I think Mr. Cocke has a good knowledge of the way this thing works, the way it is intended to work. You may answer.

* * * * *

THE WITNESS: I would say, Mr. Smith, in view of the type of neutral body that we have, that the neutral body would certainly give the accused all of the evidence that he had secured pertaining to the complaint.

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* * * * *

805 BY MR. GALLAND: ***

* * * * *

820 Q. I understand that. Mr. Smith asked you whether, as a practical working proposition the accused wouldn't be likely to get all the evidence against him except the name of the complainant and you answered "Yes."

Are you able to answer "Yes" on the basis of any experience that Lykes Bros. has had with neutral bodies in actual investigations of Lykes Bros.? A. As far as Lykes Bros. is concerned as I testified to yesterday, we have had no charges against us as far as I know and we have had no fines assessed.

From general knowledge, I believe, and firmly believe, that a neutral body as we have would take cognizance of the evidence and would give that evidence to the accused when a hearing was held at which hearing the accused would also have his lawyers and/or his accountants with him if he saw fit.

* * * * *

830 Q. You testified, as I understood, that the neutral body would normally be expected to ask merely for evidence that was relevant to the complaint. A. That is right.

Q. I would like you to look at the form of demand for evidence that Lowe, Bingham & Thomson used as disclosed by Exhibit 45 in Docket 920. That is a letter to Isthmian Line, Inc., and the date does not appear on it, but it is Exhibit 45.

Will you read out loud into the record the form of the Lowe-Bingham demand for information? A. It is a letter written by Lowe, Bingham
831 & Thomson to Isthmian Line, Inc., Ohtemachi Building, Chiyoda-Ku, Tokyo, Japan.

EXAMINER MARSHALL: How long is this letter?

THE WITNESS: Just about five sentences. Its subject is the Trans-Pacific Freight Conference, Japan.

"The bearers of this letter are authorized by us to obtain any information which they may required in connection with our appointment as a neutral body under

agreement dated March 20, 1958, between members of the Gulf Conference. Please make available to them any documents or information they may require. Yours faithfully."

I cannot understand the signature. I have no knowledge of my own of the TPFCJ. I am not a member of that conference. I am not acquainted with the facts leading up to this letter and therefore, I am unable to testify as to what that means.

BY MR. GALLAND:

Q. Do you not know that the provisions relating to the neutral body are the same in the TPFCJ and the JAGFC conference? A. I testified that it is the same. But on the other hand, Mr. Galland, I don't know what leads up to that letter. I don't know what caused the letter. That letter may simply mean that they called upon the Isthmian Line to produce a document or papers or whatever it was in connection with this specific

832 complaint. I don't know. I am not in a position to say anything else.

Q. I realize that. A. It would seem to be a very general letter. What it means I don't know.

* * * * *

841 Q. Your view is that you think accusations are made only where there is something--your view is that you think accusations are made only when there is some merit to them? A. I don't think any accusations would be made unless there was some merit to them.

* * * * *

846 Q. So it follows if there is a line in the conference, even if only one that might be unscrupulous enough to destroy evidence as a defendant, it might be unscrupulous enough to fabricate evidence as a complainant? A. Mr. Galland, it certainly shows that if he is willing to destroy evidence, he is guilty and wants to cover it.

Q. I think that is possibly true. A. I don't think it is possibly true, I think it is true. I don't see how you can get out of it.

Q. I'm not trying to get out of it. If you have a person in the conference who would take such action as a defendant, might not that person, because of a lack of scruples, fabricate evidence as a complainant just as he might destroy evidence as a defendant? A. Well, if he makes a complaint, he is making a complaint on a certain basis and he is certainly, in his complaint, giving the reason why he is complaining. So once he submits that, I don't think he is going to destroy evidence. I don't see how that is tantamount to the case.

Q. Not destroy it, fabricate it was my words. A. Well, certainly if he fabricates it, the neutral body — if he is worth being appointed, he is going to discover that fabrication or he is going to try to.

847 Q. Now, that is a very interesting conclusion and I suggest we explore it. Suppose the accuser presents to the neutral body a perfectly regular looking bill of lading bearing an issue date three days before the ship on which the cargo is to go arrives at the loading port, and let's say the bill of lading is regularly signed and the signature looks like the signature of the carrier's bill of lading officer, whoever he is.

Now suppose that is a forged bill of lading. How is the neutral body going to know that unless it shows the bill of lading to the accused party and permits the accused party to come in with a handwriting expert or somebody equivalent to prove the forgery.

848 A. Of course, I am not in a position to say what the neutral body is going to do or not going to do; but I will say this, the neutral body would check the records of the custom house and ascertain when that ship arrived, when it started to load, and various other features that are open to him. I don't think he is just going to say just because he gets a copy of the bill of lading — I think he is going to investigate the matter from all angles.

Q. If he follows your suggestion, he goes to the custom house, verifies when the ship arrives and finds that it arrives three days after the date on the bill of lading. He can't tell anything worth knowing, can he, unless he knows whether the signature on the bill of lading is a genuine signature or not? A. Don't you think he is going to ask whoever allegedly signs it whether or not he signed it?

Q. I don't know. A. I don't either.

Q. I am advocating a system which will provide a system that will provide a notice of the evidence for the accused for a hearing and for machinery which would ensure that that fact be ascertained. As I understand your position, you are resisting the precautions that I am proposing.

* * * * *

859 A. But I don't think, and I will testify to that, I am not attempting to argue with you, but I just say I don't believe an arbitration based on my experience is as good or as positive in the handling of matters, as I think they should be, as a neutral body.

* * * * *

861 BY MR. GALLAND:

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862 Q. Suppose that the evidence in defense can't be produced in 15 days, what then? A. It certainly seems to me it could be produced in 15 days. You are supposing it can't — you suppose it can't, I suppose
863 it can.

* * * * *

864 MR. WARREN: Could I ask a question of Counsel? I wonder if 20 days would satisfy him instead of 15?

MR. GALLAND: No. No. "A reasonable time" is what would satisfy us.

MR. WARREN: What is a reasonable time?

MR. GALLAND: It depends on what the facts are.

* * * * *

888 Q. I know. But I am asking you to make an assumption with me that some criteria ought to be given to the neutral body that will not tell it how much to assess, but just tell it what things to think about in arriving at a decision. If the neutral body is to do some thinking as to the elements that go into the determination of a just fine, is there anything wrong with their being asked to consider, among various other matters, whether the violation was committed on purpose or by accident? A. Well, as I

expressed myself today, I don't want to set out a letter of criteria and not necessarily hamstringing the neutral body, but I think these matters that you have here are certainly matters to be considered in the judgment of a neutral body.

* * * * *

895 Q. So that why do you think that the neutral body should be subject to some criterion in determining the maximum fine each time, rather than a criterion based on previous offenses in regard to the maximum, when you won't consider the same standard in regard to the actual offense?

A. All I can say is you have got it spelled out. In your own proposal you say maximum up to a maximum of so much. Up to a maximum of so much for a second offense, up to a maximum of so much for a third offense. That certainly has got to be left to the judgment of the neutral body based on the evidence that they have, based on the investigation as to what they are going to assess.

Q. How about the financial importance of the violations of the accused line? And to the shipper consignee, competitor, or other? A. I don't see why that has to be spelled out. I certainly feel the neutral body is going to consider that matter. I don't think that they necessarily have to. It all depends on the circumstances.

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Federal Maritime Commission
Room 114 Centennial Building
1321 H Street, Northwest
Washington, D. C.

Thursday, October 29, 1964

* * * * *

912

ALEX C. COCKE

the witness on the stand at time of recess, resumed the stand and testified further as follows:

REDIRECT EXAMINATION

BY MR. WARREN:

* * * * *

Q. Mr. Cocke, on Mr. Galland's cross-examination there was talk about a supposition for unscrupulous complainant.

If an unscrupulous complainant should file a complaint, does the conference and does Lykes have confidence in the fact that the neutral body will handle the matter in a fair and impartial manner and see that justice prevails?

* * * * *

913 THE WITNESS: I certainly think so.

* * * * *

917 Q. ***I hand you a copy of Exhibit 3 in evidence, page 6, paragraph 2.

Would you please read paragraph 2 of that exhibit?

A. "The proposed neutral body system involves the only machinery of justice we have encountered with affirmatively insists upon unfair rules of evidence. The neutral body will not be restricted by the legal rules of evidence or the burden of proof required to establish criminality or even a civil claim. Instead, it will employ rules of common sense and the only standard required is that the information developed is persuasive to the neutral body itself."

* * * * *

918 MR. WARREN: This exhibit is the legal protest filed by States Marine, Mr. Examiner, before the Commission.

* * * * *

BY MR. WARREN:

Q. Mr. Cocke, you spoke of the existence of non-conference competition in the Japan Atlantic and Gulf Freight Conference.

Could you give us some more specific identification of these lines?

A. I keep as complete a file in New Orleans as I can of the competition we are faced with in the various trades, and I called my office after I testified and got them to get out my file, and among the various lines that we have as competition in the Pacific Westbound Conference — I mean

in the Japan Atlantic Gulf Freight Conference, I might also say that these lines do operate in the trade handled by the Far East Conference — but the lines are the Eddy Line, the Commerce Marine Line, the Orient Overseas Line, the Orient Mid-East Lines, the China Union Line, and the China Merchant Steam Navigation Company.

* * * * *

941 JOHN D. WALDROUP

was called as a witness on behalf of the conferences and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WARREN:

Q. Would you please state your name and professional qualifications? A. My name is John D. Waldroup. I am a certified public accountant, a member of the American Institute of Certified Public Accountants and a Foreign CPA of Japan.

Q. Mr. Waldroup, what is your business association, your position in your association, and the length of time that you have served the firm?

A. I am a resident partner of Arthur Young & Company in the Tokyo office. I came to Tokyo with Arthur Young in 1962 to establish a Tokyo office for that firm.

* * * * *

942 Q. I hand you a copy of Exhibit 12, which is in evidence, and I ask whether or not part of Exhibit 12 entitled "Neutral Body Retainer Agreement" is one of the agreements that you have executed with the Trans-Pacific Freight Conference, or is the agreement that you have executed
943 with that conference?

(Handing document to witness)

A. Yes, this appears to be a copy of such agreement.

Q. Have you also executed another agreement with the Japan/Atlantic and Gulf Freight Conference? A. Yes, we have.

Q. I hand you a copy of Exhibit 27 and I ask whether this is the agreement which you executed with that particular conference?

(Handing document to witness)

A. This is such agreement. It bears my signature.

* * * * *

947 Q. Within the context of Article 25, I am speaking of existing Article 25, of each of the conference agreements of the two conferences involved in this proceeding, is Arthur Young employed by any member line of either of the conferences? A. We have no business relationship with any member line of either conference.

* * * * *

948 Q. If you know, Mr. Waldroup, would you please tell us whether any of these firms that you have just named have among their clientele any member line connections of these two conferences? *** A. Yes, I do know. I know that Arthur Andersen and Company, or at least to the best of my knowledge I know that Arthur Andersen and Company has no business relationships with the member lines.

* * * * *

950 Q. Is the relationship between you and your client confidential?
A. It is; strictly confidential.

Q. Can you point to any rule in the Code of Professional Ethics, Exhibit 31, which describes this relationship? A. Yes, Rule 103, page 29 of Exhibit 31.

Q. Would you read that into the record? A. "A member or associate shall not violate the confidential relationship between himself and his client."

Q. Do you have an opinion with respect to the rule you have just read as to what this may require of you in the relationship which you
951 may have with the two conferences here? A. Well, it means that we are bound to confidence in the revelation of information which we gain, come across during the course of our work as neutral body, to revealing our decisions or reporting on our findings to the Ethics Committee of the conferences.

Q. Well now, in acting as neutral body for the two conferences here, who is your client? A. Our clients are the conferences.

Q. Do you consider you have a confidential relationship under the rule that you have just read between each of the conferences and yourself acting as neutral body? A. We do, definitely.

Q. Now, in addition to that, you referred to the Ethics Committee under the existing Article 25. What did you say about that? A. Well, we are required, we are — as a part of performing our neutral body, we report our decisions to the Ethics Committee as the body named by the conference to handle and to receive our findings.

Q. Would you consider that, as you read existing Article 25, that you would be in violation of that order if you reported the results of your investigation to anyone other than the Ethics Committee? A. Yes, definitely.

952 Q. Does Arthur Young and do your partners in Arthur Young ever work for competing companies in the performance of accounting or auditing functions? A. Yes, we do. It is fairly common. It is quite a common relationship.

Q. Would you describe the professional approach to working for such competing companies, bringing it down to a practical context?

A. Well, it is such an ordinary matter and such an ordinary condition in our practice that we never really have any question or any problem with regard to this.

We work for many competing companies in the same industry. For example, we work for, let us say, a half-dozen major oil companies. There is never any question as to our ability to perform work under such conditions.

Q. Have you ever or would you consider disclosing to one of the competing companies the confidential or business records of another?

A. No. Under no circumstances.

Q. Could you under the code of ethics to which you referred?

A. No.

MR. GALLAND: Do you mean would it be a violation of the code of ethics if he did?

BY MR. WARREN:

953 Q. I ask, within the scope of accountants' ethical behavior, could
you? A. No.

* * * * *

955 Q. Under proposed Article 25, a neutral body would be prohibited
from having a relationship with the accused line. Do you have an opinion,
one way or the other, as to the bona fides of this provision? A. Well,
there is nothing in our code of professional ethics which would prohibit
such a relationship, I mean outrightly prohibit it. But I would say that
in the conduct of professional practice and in the interest of maintain-
ing professional standards that are beyond question, I think it is an un-
desirable situation. It is something that you would not — a situation in
which I personally would not wish to be placed.

* * * * *

956 THE WITNESS: Well, we have in the ordinary course of our prac-
tice no comparable situation that I can think of that would so directly
affect or contradict the interests of our clients. I know that — I have
no doubt but what any certified public accountant, if he undertook such
an assignment, would do it to the best of his ability. I don't think that
it places the profession in a good position; because even if the CPA does
his job and does it conscientiously, and it is determined independently
let us say at a later date that a malpractice has occurred, it could place,
it conceivably could place the CPA in a position of question.

* * * * *

957 EXAMINER MARSHALL: Now that goes to those situations where
the neutral body has a relationship of some kind with the accused. Where
and how and what line do you draw with regard to a neutral body having
a relationship with the accuser?

THE WITNESS: Well, in the case of the accuser, the outcome of
that investigation will not — certainly the outcome will not have a tangi-
ble effect or measurable effect on his business. It may have an indirect
effect.

He is never identified in the course of our work. It's a different situation. It is a matter of proximity.

I would view an accuser, I would think that we could receive complaints from accusers who might be clients completely forgetting our client relationship. I don't think it would bother me as a CPA. I think we would receive them from the accuser just like we would receive them from anybody else. I think we would process them in the same manner.

I don't think that it would affect the diligence with which I would do the work in the least.

958 But you have got another situation when the accused line is your client. You have got a closer relationship. It is something that is more tangible and has a direct effect on that client's profitability, let us say, or that client's reputation if it is found guilty as a violator. It may subject it to legal action beyond the actions of the neutral body. The implications are that.

I would want to avoid it. I would resist any such — insofar as I personally am concerned, I would resist such an appointment, such a position.

* * * * *

962 Q. Mr. Waldroup, does your firm also act as neutral body in the Pacific Westbound and the Far East Conferences? A. Yes.

* * * * *

963 Q. Now as you know from this morning's testimony, and I think
964 substantially you testified to that effect, that under the States Marine proposal, there is a provision for the injection of the accused's regular auditors in between the neutral body and the accused. Now, as you have also testified, I believe, in substance that this is also true with certain differences, but nevertheless basically true, as far as the Westbound and Far East neutral body systems are concerned; is that correct?
A. That is right.

Q. Now, do you have any reason, explanation why Arthur Young, let us say in the United States, is operating pursuant to such a system, where the intermediary auditor is used, whereas you are operating under

a different system? Or is this compatible or does it make any difference?

A. I know that our U. S. firm had knowledge of our having acted, and our acting as neutral body for steamship conferences in Japan, and therefore, apparently were of the opinion that we had found this relationship workable and possible to work with. And this was a factor in their acceptance of the neutral body post for the United States conferences.

We were both — both in the U. S. and Japan, somewhat surprised — quite surprised to find, after we compared notes at a later date, that these neutral body systems were not the same.

* * * * *

968 Q. Mr. Waldroup, the letter refers to the word "prosecutor," I believe appearing on the second page thereof. Do you regard yourself as a prosecutor when acting as neutral body pursuant to Article 25?

* * * * *

THE WITNESS: Well, I would say it says it must function as an investigator. Here it says it must function as an investigator, prosecutor, judge, and jury.

Now, I frankly don't consider the element of prosecutor in this context or in the context of Article 25 and the whole gist of this letter to carry any heavier weight than the implied instructions that this is a fact-finding process. Basically I view our function primarily as arbitrators or as an umpire sitting between two parties. One party happens to — for reasons apparently well established, does not wish to identify itself nor could it reasonably have access to the accused's records, so to that extent, someone has to investigate; someone has to determine to the best of their ability what the facts are. We would surely not act in the role of

969 investigator, any more to withhold the facts which may be in evidence, in favor of the malpractice not having occurred, any more than we would try to establish what had happened. In other words, we would not take one side, really, more than the other, because I think if we did that, we would not accomplish the goal that seems to have been set down by the conferences in establishing a neutral body system.

* * * * *

972 Q. Taking say, the Japan Atlantic and Gulf Freight Conference, if
973 you can answer, are you able to say how many complaints thus far?

A. We have had two complaints filed.

Q. How about in the Trans-Pacific Conference? A. We have had four complaints filed.

Q. Are you able to say of these six complaints, the number of lines that may be involved as accused lines — I don't know if you have that.

A. To the best of my recollection, it is 11, as I recall.

Q. Eleven involving six actual complaints? A. That's right.

* * * * *

974 MR. WARREN: ***Are these six complaints still pending or have they been finally determined?

THE WITNESS: They are still pending.

EXAMINER MARSHALL: And there are 11 carriers, 11 accused — they are different; no duplications there? There are 11 different carriers?

THE WITNESS: That's right.

* * * * *

976 Q. Mr. Waldroup, you have referred to 11 individual lines being involved in the six complaints. Are you able to say are these all American accused lines or are some foreign, some American? A. They are both. They involve both.

Q. Are you able to say in general terms what is the general category of offense, if there is a pattern involved in the six cases? A. The complaints largely involve alleged rebating.

Q. Is there a particular kind of rebating involved that you are able to reveal without disclosing anything that would compromise the pendencies and final determination of these cases?

* * * * *

977 THE WITNESS: Basically it is the easiest — I do not think that this is a violation of confidence — basically, this is a problem of cash rebating. This is the easiest way that rebating can be accomplished, at least in my opinion.

* * * * *

Q. Have any of the lines out of the 11 been exonerated or discharged by the neutral body as of this time? A. We have informed that for five of those lines our findings were negative and that insofar as we were concerned, the complaint was discharged.

* * * * *

982 A. *** When we get a complaint, we review it to determine whether
superficially the complainant appears to have knowledge; that is, posi-
983 tive knowledge, at least more than a mere suspicion that a malpractice
has occurred. If there is an indication that it's a mere suspicion, we
request him to either supply further details or some indication
that he has better than hearsay knowledge that a malpractice has occur-
red.

* * * * *

A. ***If it does appear that the complainant has some knowledge that a malpractice has occurred, our normal practice is to arrange a visitation to that line's offices. We do this on a surprise basis, and we consider it of the essence under the circumstances that we have immediate access and without the right of the member line, the accused line, to remove from its records those which could implicate it or would result in a positive finding.

We do this. We know that if the line is committing malpractices, that under the normal business conditions they must, for their own internal operations, maintain some records, though they may not be in the general books of accounting, of the amounts paid, to whom paid, what vessel was involved, and that sort of thing.

We know that they can't operate as a practical matter a rebate system without having some records of it.

So we try to approach it from the standpoint of taking an inventory of their records, at least in the areas which we would consider likely that they might keep such records.

984 Q. Is that promptly upon the instance of the surprise visitation?

A. That is, yes.

Q. Does the inventory method which you have just alluded to, is that, let's say, to the extent possibly foolproof in avoiding the possibility of secretion of documents? A. It is not foolproof. Not entirely. We carry it to the extent that we deem reasonable under the circumstances. We take the opinion that if records are maintained in company premises, then we should have access to them.

Well, we make a review, let us say, of the records. In other words, an auditor's approach is one of establishing control; that is, control over the facts, control over the situation that he is auditing. In a normal auditing engagement, we have a set of records; we have a system; we have an accounting system which provides for internal accounting control that we can rely on to a certain extent in the course of our audits.

But in the case of these special investigations, under the neutral body system, we recognize that no such internal control system exists, at least insofar as their regular set of records is concerned. I mean it is possible that they can pay rebates and try to describe them as other payments. We don't overlook it. We consider it essential to have access

985 to their general records, too, but we at least try to have all of the records which very likely affect this transaction or this possible transaction, available for our review and perusal. If they don't pertain to the complaint, then we pass right through them. It's very easily reviewed.

Q. When you make a surprise visitation, which you have referred to, what might prevent some clerk or some employee of a line from going in another room and pulling something out of a file the minute that they know you're there and you have told them you are investigating pursuant to some circumstance? What measures, if any, do you take to prevent possible secretion or is this a problem? A. Well, we recognize that this possibility exists and I don't care to go into this at this place. All of the techniques that we do provide — for one thing, enough staffing — we provide enough staff to at least inspect, to review the records, and at the points where such records would normally be kept. It's obviously impossible to do everything.

Q. Do you make a determination as to what documents are relevant and call for those documents or do you leave this up to the accused line?

A. We determine what is relevant and request such records.

Well, we proceed with an examination of the financial records. We have discussions with the personnel of the accused line.

986 Q. Has any accused line that you have dealt with thus far ever complained to you about any lack of fairness on the part of your activities?

* * * * *

THE WITNESS: No, they have not.

* * * * *

Q. Do you interpret existing Article 25 as requiring a hearing before making a final determination and imposing an assessment? A. Well, I don't think it is specifically called for. That would not be my specific interpretation of Article 25. But this is a normal practice, a normal procedure in our accounting work.

* * * * *

988 Q. Well, aside from Mr. Carpenter's reasons, whatever they might be, can you conceive or do you believe that there are compelling reasons or important reasons why an accused line's regular auditors could serve a useful beneficial purpose and should be injected between the neutral body and the accused, in making an investigation? A. Well, the fact does exist that they do have knowledge of the accused line's accounting procedures. However, the company's own personnel have every reason to have a more intimate knowledge of the company's accounting procedures.

* * * * *

989 THE WITNESS: Well, we are constantly faced with this situation of dealing with clients, in clients' accounting offices and working with their records.

Our staff are trained and have certainly been taught that they should operate with as little inconvenience as possible. This is often accomplished by the client in the case of an examination or a member line,

the accused line, assigning one or more of their staff to assist us in the production of records, the location of records, identification of records. We have no objection to this. We know that this expedites out examination and under those circumstances, I don't think that we have been — that our investigations have resulted in any more inconvenience to the member lines than have their own auditors' regular examinations.

BY MR. WARREN:

Q. Have you had any complaints from any of these people whom you've investigated to date, about the inconvenience of looking at their records? A. No, I have not.

Q. When you make a surprise visitation, you see the appropriate officer or employee of the line, perhaps the comptroller. Do you announce to him, "We are Arthur Young. We want to look at all of your records in the entire place"? Do you do anything like that? A. No, we say that we want to look at the records that are concerned with the complaint we have received. Now we do recognize we are not in a position to know where all such records might be or even what is the nature of such records. We know that that possibility exists. We know that memorandum records can be kept in the executive's desk drawers.

EXAMINER MARSHALL: As a typical proposition, how do you identify the complaint you have? Can you give me some sort of illustration? What do you tell the accused when you say, "We have a complaint and want your records"? Of course I presume you have to tell them to some extent what the complaint was, in order for him to know what records would be relevant. What do you tell him?

THE WITNESS: Well, in that point in the investigative process, we have not, as a regular practice, revealed the nature of the complaint because we feel that we would be in a far better position to have access to these records, which may well exist, that have a bearing on the complaint, if we tell them that — I mean if we walk in and we say, "Mr. So-and-So, we want your confidential rebate file on Vessel No. such-and-such, involving the shipment of jute" — I mean, you know, any product

from one port to another — I think we'd be naive to expect them to produce it.

991

So we're at a disadvantage.

EXAMINER MARSHALL: Well, what do you do? You go in and tell them you have a complaint?

THE WITNESS: Yes.

EXAMINER MARSHALL: Then do you indicate specifically the records that you seek? How do you demand production?

THE WITNESS: Well, as I mentioned, we would select key record storage locations at random; that is, on a logical basis; the Freight Manager or Treasurer normally keep records — and we request that we be allowed to review the records stored in their file cabinets or in their desks or in cabinets, shelves that they might have, or a safe in the case of a treasurer who has a safe sitting in the corner of his office.

"Mr. Treasurer, we want to see what is in here."

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992

BY MR. WARREN:

Q. Mr. Waldroup, suppose if you were to make a surprise visitation upon an accused line and made a demand at that time for the documents relevant to the complaint that you had investigated in the particular case, and suppose that the financial people or the appropriate personnel of the member line said, "Well, I would rather you not proceed at this moment, I would like to call in our regular auditors, let them be present while this is going on"; would you have any objection to that? A. No, not as long as we maintain a reasonable degree of control against secretion of records that might have a bearing on this while the regular auditors are coming. If we can do this, we have no objection to such a procedure.

Q. But if this happened, would you relinquish control or direction —

A. No.

Q. — of the investigation to the auditors? A. No.

Q. But if they served, let us say, as a convenience to the particular accused line, for one purpose or another, whatever the accused line

may say on that, I take it you would have no objection? A. That would be perfectly acceptable.

* * * * *

996 Another feature from the standpoint of the convenience of the conference at the moment, and let us say the continuity of the neutral body system, is this right to represent, right to have a business connection or business relationship, professional relationship, with a member line.

As it so happens, this is under the present conditions a matter of the conference better insuring their ability to continue the system and have a better choice, a wider choice of neutral bodies, of firms that can act as neutral bodies.

BY MR. WARREN:

Q. Mr. Waldroup, do you put this on the grounds of convenience only, or do you make the observation on any other grounds as to the qualifications in this regard? A. Well, I would say this, that although we do not have a business relationship, any relationship with a member line at the moment, nor have we had during our term as neutral body, I don't know what the situation will be in the future, although I have no

997 reasonable expectation, no — even no thoughts or even no contingency of such happening. But I should think that this could well be desirable.

* * * * *

1007 The other matter of arbitration, as I told you, we look on the neutral body process, this is a process of arbitration, and we don't see that anything is gained by adding another level to that process of arbitration.

* * * * *

Q. Mr. Waldroup, do you know of any other international firms in the Far East that are available to, let us say, perform this kind of function, neutral body work, other than those that you have specifically
1008 discussed early this morning?

* * * * *

THE WITNESS: Well, that would depend on what type of firm the conference thinks best to act as neutral body.

* * * * *

Q. Do you have any — excuse me, have you finished? A. I don't know of any other firms that — I don't have offhand knowledge of — law firms apparently are out of the question. This might be considered.

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CROSS-EXAMINATION

BY MR. SMITH:

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Q. Then is it fair to say, as a practical matter, the evidence of a malpractice is found in the books of the accused steamship company? Practically exclusive?

* * * * *

Q. Books and records. Documents. A. Documents. I would say so, yes, primarily.

Q. Then let me ask you this, in your previous discussions when you refer to evidence of malpractice, are you talking about documentary evidence exclusively?

MR. WARREN: Question for clarification: Does the witness understand the "documentary evidence"? Would you clarify that?

MR. SMITH: I don't think I can clarify it, but I will try if the witness doesn't understand.

EXAMINER MARSHALL: I think the witness just indicated that he is familiar with the terminology about books, records, and then used "documents" as cumulative reference.

Is this a known term to you, Mr. Waldroup?

THE WITNESS: Well, documents would include the whole range of records that are available, I mean that are used by a line in the conduct of its business, but not limited to the general books of account; it would include manifests, waybills, bills of lading —

BY MR. SMITH:

1015 Q. That is what I mean by the term. A. Memorandum, memorandum books of account which are not in the general books of account.

EXAMINER MARSHALL: Pretty much anything and everything on paper?

THE WITNESS: Anything and everything.

* * * * *

"Q. Then let me ask you this, in your previous discussions when you refer to evidence of malpractice, are you talking about documentary evidence exclusively?"

THE WITNESS: Well, let me say this, we would use documentary evidence as a basis of a decision, as the basis of a finding.

We would consider oral evidence as a result of our discussions with the member line's employees. This would be considered. The basic reason we do find on a malpractice, we do it on the basis of documentary evidence.

BY MR. SMITH:

1016 Q. Well, let me ask you this, what about a sworn statement of a longshoreman that a particular parcel was a great deal larger than the 40 cubic feet it was declared to be? Would you or have you used that type of evidence? A. A sworn statement?

Q. Or just a declaration to you, a statement to you, sworn or not? Verbal statement. A. No. We wouldn't. I wouldn't — of a longshoreman?

Q. Or of any person that might be —

EXAMINER MARSHALL: An ethical longshoreman.

MR. GALLAND: I am sorry the record can't reflect the tone of the witness' voice.

BY MR. SMITH:

Q. You haven't used such statements to date, I take it? A. Beg your pardon?

Q. You have not used evidence of that type? A. No, we have not.

I would surely not have any finding on the basis of such a statement alone.

* * * * *

1017 Q. The realm exists that a cash rebate would not be reflected in any of the documents? Is that fair to say? A. No, No. Let me say this, that it would not — there would be no one place that we could be sure that a cash rebate is reflected; that is, no one place that we could go to. We would have reason to believe that if a line is rebating, the line must keep some kind of record — memorandum, they must keep something to know. They can't remember if they paid the company XYZ for the last shipment. They must have some record somewhere of rebates paid and rebates due. They have to have some — most lines are spread out, operating many branches, many trades. They must have some method of their own control over paying a rebate twice.

* * * * *

1018 Q. I believe you testified that, generally speaking, the evidence of a malpractice would be found somewhere in the documents of the operations of the steamship company. Isn't that correct? A. Yes, but not exclusively.

Q. Under that general situation, would there be any risk of giving an accused all of that evidence, since it comes from his files anyway? A. Well, it would not necessarily come from his files. As I said, this is not exclusive. It could come from employees who possess such records.

Q. So you might not give evidence that you secured from the steamship company's employees to the employer, is that correct? A. That's right.

* * * * *

1022 Q. I can be more specific by asking you: Is there anything lost from your effectiveness as a neutral body by virtue of arbitration? A. Only to the extent that it would be necessary to produce in evidence for the arbitrators the evidence which the neutral body had knowledge of

in making a decision, in order for the arbitrators to fairly judge whether the decision was right.

Basically it is still a decision of the conference, naturally, as to whether they have arbitration or not.

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1028

Federal Maritime Commission
Room 114 Centennial Building
1321 H Street, Northwest
Washington, D. C.

Friday, October 30, 1964

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1030

MR. GALLAND: We'd like to have Mr. Waldroup resume the stand and Mrs. Scupi will cross-examine him.

JOHN D. WALDROUP

the witness on the stand at the time of the recess, resumed the stand and testified further as follows:

CROSS-EXAMINATION

BY MRS. SCUPI:

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Q. It's true, Mr. Waldroup, isn't it, that right now Arthur Young and Company has no financial corporate or contractual interest in or connection with any member line of the Trans-Pacific Conference or of the Japan-Atlantic-Gulf Freight? A. That is true to the best of our knowledge.

Q. And you could continue to serve as neutral body if such an interest or connection were prohibited? A. Yes.

* * * * *

EXAMINER MARSHALL: If you had business considerations to reckon with in that regard wouldn't you have to make a selection of whether you were going to be in the accounting business or engage in the neutral body business, one or the other?

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THE WITNESS: That is right. We do work for certain companies in the shipping industry that happen to have no connection with this trade.

* * * * *

Now, from this standpoint, the neutral body work is — I mean it represents a very small percentage of our public accounting work, and certainly to put it on a business basis, the compensation is not substantial when you relate it to the amount of compensation, let's say, for auditing, where we get — so, I would say under the present circumstances there is no prohibition from our continuing to serve, but as the Examiner stated, it's a business decision. This is something that we have to face as it comes up. We are not looking for business in any of these trades. Our Code of Ethics prohibits us from solicitation, but I think we would have to re-examine our position if an auditing relationship were ever proposed, that it is of such proportions that it would cause us financial disadvantage to continue this relationship as provided.

EXAMINER MARSHALL: Thank you.

BY MRS. SCUPI:

1033 Q. So as a purely business matter, you would prefer to be free to accept an account of a steamship line that is a member of one of the conferences? A. Frankly, this does not make a great deal of difference to me at the present time, from a business standpoint. I understand that this is from the standpoint of the conferences' wishes, that they wish to have wider choice in the selection of neutral bodies. I don't see why they should be narrowed down, as they appear to be narrowed down, to one firm. We don't care to exert by reason of our position of non-affiliation, we don't care to exert a position of monopoly on the neutral body business. We are not looking for business in that regard.

Q. Thank you. I was interested in just your viewpoint, of Arthur Young and Company. A. That is our viewpoint.

* * * * *

1039 Q. Don't you also feel that whoever the conference hires as a neutral body and whatever difficulties they have in finding an appropriate neutral is their business, too? A. Basically it is their decision. This does not prohibit us from — and I think we have an obligation, as long as we are a neutral body — to at least point out what, in our opinion, from working with the neutral body system, what procedures are effective and what procedures are not.

Q. Yes, but you don't really care whether the conference has two accounting firms or five accounting firms or ten accounting firms to choose from, do you? That's their business? A. That is their business, yes.

* * * * *

1040 MRS. SCUPI: Is your answer to the last question yes, that you do think it is better, if possible, even to avoid the appearance of bias?

THE WITNESS: I think it is better, if possible.

* * * * *

1044 Q. Is the difference between the two situations really that if the accuser is never revealed, there is no way of knowing that the neutral body sustained its own client's complaint? Isn't that why you would avoid embarrassment? A. Well, we know that there are reasons for not revealing the names of the accusers, entirely independent of this matter.

Q. Forgetting about those reasons, isn't that a fact, the fact that regardless, for whatever reasons you do not reveal the accuser's name, isn't it a fact that because you do not reveal his name, the neutral body would never be embarrassed by a situation wherein it had sustained its own client's complaint and the accused later turned out to be innocent? No one would ever know? A. Yes, and I think that is reasonably true, and I think part of this is due protection to the neutral body.

* * * * *

1045 Q. In the course of your work, Mr. Waldroup, do you form opinions as to the honesty and integrity of your own clients? A. No, we don't. Not unless circumstances arise which prove otherwise.

Q. Your assumption is that your clients are honest and respectable people? A. That is right.

1046 Q. And this assumption is sometimes based on years of contact with them in which no evidence to the contrary has come to your attention? A. That's right.

Q. You have some close relations, don't you, with the men who manage your client's business? You know them? A. Yes, of course. These men we have known for years.

Q. And at least some of them, you think, are very honest, reputable men? A. Yes, very definitely.

* * * * *

1047 Q. Do you think honest men forge documents? A. Basically,
no.

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1052 BY MRS. SCUPI:

Q. Mr. Waldroup, if you received a complaint against States Marine Line and you requested States Marine Line's regular auditors, Peat, Morwick, Mitchell & Company, to locate and report to you certain financial data, do you think that Peat, Morwick, Mitchell & Company would give you any false or incomplete information?

1053 A. I do not.

Q. Would your answer be the same for Price, Waterhouse?

A. I have stated that I think any Certified Public Accountant, regardless of firm name, would try to do the best job he could, under the circumstances. I have never and I do not intend to now, impugn the ethics of any members of my profession. I only think it is an undesirable position in which to place a C.P.A.

Q. But if Peat, Morwick & Mitchell had no objection to being placed in that position, you would work with them, wouldn't you? A. Yes.

Q. You also testified, did you not, that a line's own auditors might be helpful in assisting the neutral body because they knew the neutral body's accounting procedures, but they are not necessary because the accused's own personnel know them as well? A. I think you are mistaken — neutral bodies accounting procedures —

Q. I beg your pardon. They know the accused's own accounting procedure.

MR. WARREN: What page is that, Mrs. Scupi?

MRS. SCUPI: 998.

THE WITNESS: Yes, I stated that the line's own auditors could be helpful and I stated that there is no objection, and there is no reason
1054 why the member line could not ask the senior accountant or whoever is working on that job, to help. "You help the people of Arthur Young & Company. We don't have the extra personnel; we don't have a man to assign them, and would you help them during your work". There's no objection to that.

Q. You also testified, didn't you, that there is always the danger or at least sometimes the danger that an accused might impede your investigation by hiding files? A. That's right.

Q. Would an auditor be likely to do that? A. I don't think so.

Q. Do you have a stronger opinion about that? A. Yes, because I think the auditor has an independent relationship. But I think that still does not affect the question of who is in control of the investigation and who is in a position to determine the facts first-hand. I have never tried to run an audit by remote control. I think that it would be most or at least an investigation, let me say, of this type by remote control, but I think that the element of surprise is of the essence, and I think that the element of being on the job when the Treasurer comes in with his cash funds in his paper bag to put in the safe, to be there when he does that, to see it. I think an audit and investigation of this type are conducted for two entirely different purposes.

1055 Q. Yes, I appreciate your full answers, but perhaps you could confine yourself to my question a little bit more directly. A. Pardon me.

Q. I was talking about locating records. An auditor could certainly do that, could he not? A. Yes.

Q. And he'd not be subject to the same temptation to hide them, would he, as the line's own personnel? A. I basically do not think so. I should hope not.

■ * * * *

1057 THE WITNESS: More than one time that our role as neutral body is primarily that of arbitrator, and I have really never thought of our role in the context that you place it as being a prosecutor. We're in to find the facts, whether they be for or against the member line that is being investigated.

BY MRS. SCUPI:

Q. You do investigate, don't you? You are also an investigator?

A. Yes.

Q. And you do present the evidence that you have amassed or whatever evidence you choose to present, at a hearing, don't you? A. Right.

Q. At least insofar as you do that, you are a prosecutor, are you not?

1058 Isn't that what a prosecutor does, is present the evidence to show guilt at a judicial process? A. Yes, but a prosecutor in my understanding does that and that alone.

* * * * *

1060 Q. Do you present the evidence at this hearing that you have amassed, which tends to show that malpractice occurred? Do you present that evidence to the accused? A. Insofar as possible.

Q. Isn't that, just that little function that you perform, and let us ignore for the moment the other functions that you perform, doesn't a District Attorney perform that same function when he presents the evidence that tends to show a man committed a crime? A. He may well, but —

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1061 THE WITNESS: I must say that my knowledge of a District Attorney is limited to TV and general non-legal knowledge.

* * * * *

1064 Q. Is it possible a neutral body is lied to, Mr. Waldroup?
A. Yes.

Q. Well, let's see how the neutral body goes about establishing the truth. Let's take the example of the longshoreman who made an uninvited appearance in yesterday's hearing. Let's say that he tells

you that cargo measured twice the measurement as shown on the bill of lading. Let's say that he gives you a sworn statement to that effect. Suppose, further, that that longshoreman has a grievance against the steamship company, the accused, for any reason. Maybe he was not chosen for over-time work; maybe he was not compensated enough for a claim he had against the steamship company — if you do not tell the accused who that longshoreman is, who its accuser is, how can the accused bring the facts of any animus that that longshoreman might have against it, to your attention? A. Well, in the first place, you are drawing — the longshoreman is not a member line, and we would not be under any prohibition or at least we would consider it in the realm of possibilities to make investigations as to the background of that longshoreman, and we would —

1065 Q. Would you disclose the longshoreman's identity to the accused?

A. In a case like that, I think we would use it to develop further information, if at all possible. I don't —

Q. I think my question is susceptible of a direct answer. Would you or wouldn't you? A. If we had received the information in confidence, we would not. If we had received the information unsolicited and without a pledge of confidence, we would consider it in the light of the circumstances. I can't imagine —

Q. But if you received it in confidence you wouldn't disclose it?

A. No, we would not. I am quite sure we would not lay a great deal of weight without substantiating, further substantiation of the fact.

Q. Would you discount it altogether? A. We usually go down and check the weights ourselves, where this is possible.

Q. Would you discount the statement altogether? A. I would not discount it altogether, but I would not — I'd examine it under the light of the circumstances.

Q. But the accused would have no way of knowing, if the statement was given to you in confidence, who is the accuser; that his accuser was this particular longshoreman who had a grievance against him?

1066

A. Well, in the first place, this longshoreman we would not accept a complaint — if a longshoreman comes to us and says, "I have a bill of lading," we have no concern with that. That's not the subject of a complaint.

Q. You don't receive complaints from longshoremen? A. No.

Q. But you would receive evidence from longshoremen? A. We would receive evidence from any available source.

Q. Suppose the longshoreman told a competing line that story? The competing line came and told you, and you went and saw that longshoreman and he gave you that information in confidence, would you tell the accused who the longshoreman was? A. Well, I think under those circumstances — what you are speaking of — I would look into it further; I'd check the railroad bills of lading —

Q. I am not asking you that. I am asking you a direct question of whether you would tell the accused who that longshoreman was?

A. No, I would not.

Q. Thank you.

Is the motivation of the informer sometimes relevant to the truth of his charge? A. I beg your pardon.

Q. Is the motivation, the personal circumstances of the informer sometimes relevant to whether or not he is telling the truth?

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A. Yes. We take that into account.

Q. How would you establish what the motivation of the informer was, if you did not tell the accused who the informer was? A. I beg your pardon?

MRS. SCUPI: Will the reporter read the question?

(Pending question read by reporter.)

THE WITNESS: Well, we would always look for — we know that there are aggrieved employees, and we know that there are aggrieved people in an organization. And I think we would discount any such evidence accordingly and use it to supplement, proceed with the investigation and use it as a basis to lead to other things.

BY MRS. SCUPI:

Q. Let's take the example of an aggrieved employee. Suppose an employee tells you that his expense account is in reality a rebate fund? Would you wonder, in the first place, why the employee was pointing the finger at his own employer? A. Yes, of course.

Q. Wouldn't the relations of the employee to the employer be relevant? A. Yes, and we would — I will say this — that when we conduct an investigation, we talk to enough people that we get a feel of the relevant situation that exists in an office. We would make inquiries in such a way that we would try to ferret out such a relationship.

Q. Suppose that employee had a personal grievance of long standing against the company president. And suppose that grievance was just between the two of them. How would you ever find out about it if the company president was never informed that it was that employee who was making the accusation? A. Well, if you have the same knowledge of human nature as I understand it, these things aren't, as a matter of course, isolated. It would be most unlikely that no one in the organization would have knowledge of such a grievance. Employees don't act like that. I mean this is not human nature.

Q. Well, let's say it was known to five other employees, five other officers or employees of that organization. How could you be sure of talking to those five. What do you do when an employee makes a grievance? Do you talk to every single employee or officer of the company to find out what kind of a guy that employee is? A. No, we don't but we would make a reasonable inquiry into the circumstances, and we would try to develop from that outside and supporting and confirming information that confirms the employee's representations, and often this is the case — I mean — but the problem exists in the example that you've used, that if an employee has control over one record, and he alone, and you use that record to pinpoint malpractices, pinpoint a malpractice, and you —

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THE WITNESS: Excuse me. Would you read that back?

(The reporter read back the last answer by the witness.)

THE WITNESS: Even though you can establish, even though this malpractice is confirmed by other entries in the company's records, even though we know there's enough internal control to know there could not be collusion, that collusion could not reasonably be expected, and the mere other entry confirms the employee's representations, then we would be in a position to make a finding on that basis; and we would be doing undue harm to such an employee if we had to reveal his name.

BY MRS. SCUPI:

Q. Well, let's talk about this record that is under the employee's control. You could not produce that record and show it to the accused, could you, because that would show who the informant was? A. That's right.

Q. So what evidence could you show the accused? You could not tell them who the employee was, and you could not show him the record that proved or tended to prove or was evidence of malpractice. You would have to show him other evidence, leaving out that most crucial evidence?

1070 A. Let's say that we have traced and we have matched transactions in that record with transactions recorded in another part of the company's records, over which this employee, the aggrieved employee has no control; and yet they are described in the company's records as no control or let's say access, and they are described in the company's records as something entirely different —

EXAMINER MARSHALL: Let's take a five-minute recess.

(Whereupon, a brief recess was taken.)

* * * * *

1071 BY MRS. SCUPI:

Q. Before the recess, Mr. Waldroup, we were talking about a complaint you might receive from an employee who had a personal animus against his employer and how you would go about investigating it, and you agree that animus might be relevant to the truth of his charge, and how you would go about finding out about his relationship with his employer.

I believe that you said you would try to develop the facts about whether or not he was a disgruntled employee.

Now, you can't identify him so you can't go around and ask the other people how does John Doe get along with his bosses. How do you find out what his relationship with his employer is? A. You could ask about half a dozen people.

Q. Make a list, say, of John Doe and Harry Moe — A. John Toe and Joe Smith. I mean we wouldn't need to do it in such a formal manner. There are ways of doing it without identifying the parties.

Q. I am interested in those ways. A. Well, just as I told you, not limit it to one party.

Q. Ask about three or four or five people? A. And the main point I would make is we pursue the matter further. We try to establish — I mean, in the hypothetical case you have given, we would try to establish

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if the information furnished by this aggrieved employee confirmed elsewhere in the records over which this employee has no control.

Q. We will get to that in one moment.

If we might just talk about the animus, I would appreciate it if we could just talke about the animus for just a few questions.

You would interview about how many people in the organization?

A. This all depends on the circumstances. There are various sizes of organizations, and I don't — I simply could not say other than we proceed as we best see fit under each set of circumstances. There are no two set of circumstances that are alike, and we have to use our judgment in that.

Q. So it depends on the case whether you would ask one person or ten people or twenty people or forty people how one person or ten people or forty people got along with the other people in the organization?

A. I think that — yes, it would depend on the circumstances.

Q. Okay.

* * * * *

1073 Q. So the one thing that you wouldn't do, if the information was told you in confidence, is tell the top people in the organization who he was?

A. That's right.

* * * * *

1075 Q. Suppose the line's own personnel was giving you that information in confidence. I understand you said you don't know how you would finally dispose of the complaint. But I am just asking you, in investigating it, you would not disclose to the accused line who that employee was and you would not show the accused line those slips of paper? A. Not if we received in in confidence.

Q. You started out in the beginning of your example saying that it was unlikely there would not be other records. That implies there might not be other records, which would confirm or rebut the evidence given to you. Under those circumstances, would you dismiss the complaint?

A. Well, there may not be other records, but there is a whole set of facts, a whole situation, which really I can't, I really can't imagine, I can't out of imagination decide, without more information, what we would do under that set of circumstances, just with that limited —

Q. You testified yesterday that documentary evidence of rebating is not kept in easily detectable form, did you not? A. Ordinarily.

* * * * *

1076 Q. Suppose you have information, you were tipped off that a rebate was given and you investigate the books, and because the evidence of rebating is not kept in easily detectable form, the books are ambiguous; a rebate could have been given or could not have been given. Is that possible? A. That is right.

Q. Now, suppose the complainant shows you a letter or a memorandum that is ostensibly written by an officer of the company directing that this rebate be given. Suppose this letter is given to you in confidence. Would you show the letter to the accused line? A. Well, no, I wouldn't. But I would then know who is in charge of writing such letters in that line and I would — and I would — the first step in my investi-

1077 gation would be to go in and demand immediate access to his

records, where such records are normally stored, and I would —

Q. Now, suppose you look through those records and you don't find the letter. What do you do then? A. Well, if this letter is presented by the accuser, you could well go back to the accuser and request, say if I am to proceed on this, I cannot accept this superficially, but if I am to proceed on this complaint, I must be allowed to discuss this letter with the accused. If you have any objection to that, make them, and if you do, why I can't use this in the course of our examination. I can't use it.

Q. And the accuser says, "I have such objection. I want you to protect me." Do you then dismiss the complaint? A. As I say, I would use that insofar as possible as a lead toward developing other information.

Q. Well, Mr. Waldroup — A. That would tend to confirm or deny that.

Q. We both know evidence is not inexhaustible. A. That is right.

Q. And that sometimes there is only a certain amount of evidence in existence. Now, I have given you a case where the evidence which you can disclose is equally consistent with a finding of rebating or not rebating, but the evidence you can't disclose indicates in fact that rebating has occurred. I am asking you in such a situation whether you would dismiss the complaint or whether you would — I believe you have already testified you would not show the confidential information to the accused, and I think it seems to me the only other alternative is to find in fact that a malpractice has existed.

1078

EXAMINER MARSHALL: Did you say a malpractice has occurred?

MRS. SCUPI: Has occurred. The alternatives are either, one, to disclose the information to the accused and give him an opportunity to rebut it — now I understand the witness to say he would not do that if the information was given in confidence. It seems to me then the alternatives are either, one, to dismiss the complaint or, two, to determine that a malpractice has occurred.

BY MRS. SCUPI:

Q. I am asking you which you would do? A. I would be inclined, if that were the only thing, I would be inclined to dismiss the complaint; but it would depend on the circumstances in the case. We have never —

Q. The circumstances are as I have given them to you. A. Yes, but this is not the way it happens in practice.

Q. In practice, it happens that evidence is inexhaustible? A. It is not inexhaustible, but it is not isolated to one single page.

1079 Q. Is it difficult to conceive of a situation where the evidence that tips the scales is evidence that cannot be disclosed under your obligation to keep the identity of the accuser secret? A. Yes, yes.

Q. Is it difficult to conceive — A. No, no, it can be conceived, it is conceivable that that is the evidence that tips the scale.

Q. In such a situation, do you dismiss the complaint or do you find that a malpractice has occurred? A. In such a situation, we would find — and depending on the circumstances, we would find that based upon the preponderance of evidence, that a malpractice has occurred, if that is what the evidence shows.

Q. I have tried to be very clear that if you consider the undisclosed evidence, the preponderance of evidence is that the malpractice has occurred, without the undisclosed evidence, the scales are equally weighted? In that circumstance, what do you do? A. We would be inclined to find that a malpractice has occurred.

Q. Thank you.

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1080 Q. That's right, whom it is investigating. A. Investigating — when it reaches a "not guilty" verdict?

Q. Yes. A. I always have. I never have had reason to conduct an investigation without the knowledge of the accused line.

Q. And you would tell the accused line when you find it innocent? A. Yes, that's right.

Q. Where in the proposed Article 25 are you permitted to do this?

A. I am permitted to do it as a part of our investigative process.

Q. You testified yesterday, did you not, that Article 25 is the basis of your authority to act? A. That is right.

* * * * *

1081 Q. All right, let's go to Exhibit 1, then. A. May I have Exhibit
1?

(Document handed to witness.)

BY MRS. SCUPI:

Q. I refer you to page 7, the last paragraph under 4, that's following the little a, b, c, and d. Would you please read into the record that paragraph beginning with "after", and the following paragraph, paragraph 5?

A. "After its decision, the neutral body will then report to the Ethics Committee the decision and the amount of the damages assessed, if any. In addition, the neutral body may report evidence or information discovered during its investigation, but the extent of such further reporting, if any, shall be subject to the absolute discretion of the neutral body and in no event will the neutral body report the name of the complainant without consent or report confidential information."

1082 "5. The Ethics Committee will notify the members through the chairman of the decision and the damages, if any, and will also at the same time instruct the chairman to notify the respondent of the decision, but only if a breach is found, and in such case the respondent will be furnished with the neutral body report and a conference debit note covering the liquidated damages assessed."

Q. Now I repeat my question: Where in that proposed article are you permitted to tell an accused line that you have reached a "not guilty" verdict? A. Well, if the neutral body does not tell the accused line

for whom a non-guilty decision is reached, then may I ask you a question, where in the agreement, how is the accused line to know?

Q. That is exactly the problem that States Marine Lines has been wrestling with during these proceedings, and I have no answer to your question. A. It doesn't seem to be a problem. We do it as a matter of course. We just in the same sense that we would inform a line, we have found you guilty of a malpractice, and here such and such, we would say when we complete an investigation, this is part of an investigation process, in my opinion.

Q. Well, States Marine couldn't agree with you more. In States Marine's proposals, which are Exhibit 5 in this proceeding, States Marine provides that the neutral body shall submit to the Ethics Committee a report setting forth its findings of fact and stating whether the complaint
1083 has been proved or not proved.

Did you know that this proposal was rejected by the conference?

A. Yes, I gathered that that proposal was rejected by the conference. That is why we are here.

Q. But you would be in favor of telling the accused if you had reached a "not guilty" verdict? A. We do it as a neutral body; but this protects the accused, because in that case, under our procedure, his name isn't brought out that he has been accused of such a thing, even though we have found it to be an unjust — or to be without warrant. It seems to me this is in the accused's interest, that we notify him, and it is not made a matter of general information.

Q. But you think in any event that the neutral body should be allowed to tell the accused when it has reached a "non-guilty" verdict?

A. I can't imagine an investigative process without so doing.

Q. Well, I would never have imagined one if I didn't have Article 25 in front of me.

* * * * *

1089 Q. ***On pages 982 and 983 of your testimony, you said that if a complaint is too vague, it can't be investigated.

Wouldn't it also be true that if the communication of a complaint to an accused is too vague, it can't be rebutted? A. Well, I think that we do give —

Q. I am not asking you what you do. I am asking you for your opinion, based on your statement that you can't investigate a complaint which is too vague, isn't it also true that an accused can't rebut? A. This would follow reason.

* * * * *

1091 Q. You can't station your accountants in all places, can you?

A. That is right.

Q. What about records that might be kept under desk blotters or in the president's lower locked drawer, or in a vault, do you conduct a search of the premises to find such records? A. On a test basis, not a search as such. We request the personnel of the member line to allow us to review — we do not make a search.

Q. You don't go in and lift the desk blotters, do you? A. No.

Q. Or open the drawers and go through them? A. No, we do not.

Q. You are really not equipped to do that, are you? A. No.

We do not.

We request that they produce the records that are contained in that safe. These are business records for our review.

1092 Q. Well, isn't the only danger of concealing malpractices when you make your investigation the danger that records could be phoney? Books, records, account books, they can be phoney?

EXAMINER MARSHALL: Could be what?

MRS. SCUPI: Phoney.

EXAMINER MARSHALL: Phoney? Thank you.

THE WITNESS: Well, let's take it from the standpoint of common sense. The treasurer has in his safe a cash fund. He has a record showing disbursements of that fund, and it happens to tally with the balance of cash that is on hand. Even though that record is not a part of the general books, I would be inclined to believe that it is not phoney because it checks with something else.

I don't think that from the standpoint of reason businessmen, treasurers, are accustomed to keeping in their possession records which are phoney to mislead the neutral body when they come in for their examination, to mislead them in the wrong direction.

BY MRS. SCUPI:

Q. Right. But what I am getting at is really your method of discovering malpractices is to investigate the files that are kept in the regular course of business, the accounts, the record books, the memoranda, the correspondence; and not to search the premises? A. That is right.

1093 Q. And so the method of concealing malpractices would be concealing them on the books? A. It all depends on what you call "the books".

Q. All the books, the records, the accounts, including the money in the safe. Stretch the definition of "books" a little. A. As I said, if malpractices are committed, it is very likely that there are records of them somewhere. There have to be records somewhere, but not necessarily the books of accounts.

Q. No, it could be any other books? A. That's right.

Q. If a line were to commit malpractices and if it kept records of it and if it hid those records in a secret place, under a deceptive desk blotter, you would not normally find them, would you? A. That's right.

* * * * *

1096 Q. We have already established that records that are kept, records that are obviously records of rebate could be kept in such a place that you would not find it because your function is not to go in and conduct a search of the premises. A. That is right.

Q. Now I am asking you, if you were to give a line 15 days' notice of your intended visit, what steps could it take to conceal its rebating, other than hiding its records, which it could do anyway and you wouldn't know about it? A. As I said, if I am in charge of rebating of XYZ line, and I have to make payments on a weekly basis or daily basis, and

as I said previously — let me finish that — if I am the man in charge of making rebate payments, I would find it most inconvenient to have records of those rebates, what is due, what I have to pay next week in some remote place. It's possible and we can only make it inconvenient.

Q. But you don't search the premises, do you? A. No, we do not search the premises.

Q. So you look at regular records, do you not? A. No, we don't limit our look to the regular records. I repeat again —

Q. Regular documents? A. I repeat again, we do it on a location basis, and we try in that manner to have some resemblance of ability to see all of the records that likely affected the alleged malpractice. If

1097 we give 15 days' notice, it is a simple matter.

Q. The danger of concealment. What I am getting at, and it is really a simple question, is the danger in the notice provision that records will be hidden or is the danger that they will be phoned? A. The danger is that they will be hidden.

* * * * *

1098 JOHN B. WALDROUP

resumed the stand.

CROSS-EXAMINATION (resumed)

BY MRS. SCUPI:

* * * * *

1099 Q. Do you think a hearing is necessary to get all the facts?

A. I think a hearing is desirable. I think it is — I think it would be ordinary, usual and — yes, basically.

Q. To get the facts? A. Yes.

Q. Why do you think or do you think that you should make a tentative decision of guilt before hearing the accused's side of the case?

A. Well, as I told you, we have an opinion based on what information we have, and we offer the accused an opportunity to present whatever facts that they have to rebut it.

I will say this, that this is more of a formality than anything else, because we normally do this immediately upon the completion of the

field work, for example. If we go in —

Q. What is the formality? A. Well, a formality is to —

Q. What are you referring to? Not what does a formality mean, but are you referring to when you say this is a formality? A. Well, I say, the hearing is a subsequent chance that the accused would have to present anything new that they have come up with pertaining to the matter.

1100 Q. But when the accused is given a hearing, your tentative opinion is that he is guilty? A. Well, I would say we formed an opinion, a tentative —

Q. And that is that he is guilty? A. Yes.

Q. That he is guilty? A. Yes. But we have in the process of examination, we would say, "Well, what about this? Can you explain this disbursement? What about this cash fund?". I mean, this goes all along. This is not the first time that the accused hears of the —

Q. No, but I am directing my question to a different point, which is why you think that the time that you should hold the hearing is the time after you have made a tentative opinion that the accused is guilty?

A. Well, it is a simple matter of wrapping the thing up.

* * * * *

1105 Q. I am not talking about the neutral body now. I am asking your opinion on a civil or criminal suit wherein a jury is sitting in judgment between two parties, or the state and accused, either one, and it hears evidence on behalf of one of the parties. Do you think it is fair for that jury to reach a tentative decision for the side that has presented its evidence before it has heard the other side?

* * * * *

1106 THE WITNESS: I really have no answer.

* * * * *

1115 Q. Your real objection to arbitration, as I understand it, is that it necessarily entails disclosure of confidential information? A. Basically, yes.

Q. If the Commission were to decide — A. And may I add, there are other objections to that.

Q. What? A. Well, when you get into arbitration, which borders on a legal process which I guess should be, could be called a legal process, in Japan I think it particularly complicates the neutral body functions. I think it is a known fact that Japan has less lawyers per capita than any other country in the world, approximately — as I recall, one-fiftieth or one-one hundredth per capita. As I recall, there are only roughly a few thousand, 4,000 lawyers, to 96 million people in Japan. Basically things are settled by an arbitration process, which in my opinion corresponds very closely to the neutral body process.

If we add another level and we bring in all the complications that come with arbitration, we will then find it necessary, I think we will have to find an interpreter, a dual — a bilingual court reporter; we will have to have a lawyer sitting in on the proceedings. I think that the people that are involved, our staff and the whole people who would be connected with
1116 such a process, it would be against — it would be against the grain of the nature of the people that we are largely working with.

I think that it is so much more complicated than it would be in the United States, because of this factor, people in Japan — it is my observation and the basic nature of the people is that they do not like conflict, personal conflict in their life. They try to stay away from that as much as possible.

* * * * *

1117 Q. Mr. Waldroup, what has been your experience with arbitration proceedings in Japan other than Japanese television? A. Not directly any. I think the arbitration proceedings in Japan are for the most part informal and it isn't ever really set up as that.

Q. Have you ever participated in such an arbitration, in a Japanese arbitration proceedings? A. No, but I have known of them being conducted.

Q. How have you known? A. I know that there are provisions for such things as joint venture agreements.

Q. There are provisions for arbitration. I am trying to get your experience, or the basis of your experience, your knowledge, for your lengthy statements about how complicated Japanese arbitration proceedings are. A. Well, arbitration in the Japanese life is a day-to-day process. It is finding a third party, a neutral party, who will —

Q. In your day — A. Yes, this is a day-to-day, over the tea-table process in Japanese life.

Q. In day-to-day life in Japan, what experience have you had with arbitration?

1118 A. I would say every time there has been any major difference of opinion in any situation.

EXAMINER MARSHALL: That isn't her question, Mr. Waldroup. She wants to know what direct experience you personally have had with the process of arbitration in action.

THE WITNESS: Well, I think she is referring to arbitration as a formalized process. I have had no experience with that. What I am saying is this — shall I explain further? I have had no experience with formal —

EXAMINER MARSHALL: I think that is your answer and that is the end of it.

* * * * *

Q. If the Commission were to decide in this case that all the information of the hands of the neutral body must be disclosed to the accused, would you have any objection to arbitration after the neutral body's decision has been rendered? A. I would have an objection in that it would be a difficult process to organize and to carry out.

Q. And this is because of all the complications of arbitration proceedings in Japan? A. This is because of my acquaintance with the nature of the Japanese people, the fact that there are two — there are two segments of the population that speak only Japanese.

* * * * *

1120 Q. If all the conference members agree, like States Marine Lines, that they would make complaints to you openly and before the world and that all their member lines be granted the right to face their accuser, whoever he may be, will you conduct such an open hearing if that were the directive from your employer? A. Yes.

* * * * *

1122 Q. ***Mr. Waldroup, what factors do you take into consideration when you determine the amounts of your penalty? A. Well, we take into consideration, as provided in the agreement, the number of previous malpractices that have been involved with that member line: the seriousness of the malpractice, the gravity of it, the amount of — let me say, the materiality of it in terms of how much the line stood to gain as a result of such a malpractice.

Those are some of the factors.

1123 Q. Do you take into consideration whether the violation was innocently or purposefully committed? A. Well, this is something that is very hard to determine, whether —

Q. Insofar as you can determine it, would you take it into consideration? A. Well, let us say, if it is in the nature of a rebate, a cash rebate, we know that is willful; there is no question.

Q. And that weighs heavier? A. Yes, that weighs heavier, no question. But we have no way of knowing, of judging, and looking behind some of the transactions to know if they were innocently or willfully committed.

Q. Would you take into consideration whether the violation offended the spirit of the conference agreement, like a cash rebate, or whether it was a technicality, such as the wrong classification in the tariff where the classifications were rather close? A. Yes, We would do such.

Q. Would you be interested in whether the violation of the conference agreement also constituted a violation of law? A. No, basically we are not — there are many laws involved and, as we are — we are faced with the administration of the neutral body function under Article 25 and we don't

have a staff of lawyers to research whether an item is in violation of law.

1124 As a practical matter, I don't see that this would be a matter — I mean the basic problems that we are faced with are quite clearcut.

Q. What about whether the final penalty had been imposed on the accused by a court for the same offense? Whether he had already paid a fine for this? A. There again, we are faced with the administration of the neutral body retainer agreement under Article 25.

Q. The purpose of a fine is to deter the line, isn't it, from committing future malpractices? A. Well, the purpose I assume, the conference, the members must have thought that if I am prepared to — at least there must be some — it stands to reason there must be some reason for having a neutral body system, a self-policing system, which would investigate and fine on the malpractice.

Q. It should have a deterring effect on the commission of malpractices; do you think that is so? A. I should think so.

Q. And do you think that the amount of the fine should be related to the deterrent effect it will have on the accused from committing a similar malpractice in the future? A. Just as provided in Article 25, where the amount of assessment is cumulative, that is to discourage repetition.

Q. Well, for example, maybe we can take a simple example, if a line rebated and that rebate secured the \$5,000 worth of cargo, a fine of
1125 \$100 would not deter it, would it, from committing such practices in the future? A. That is right.

Q. So you do consider the deterring effect when you levy the amount of the fine? A. To that extent, yes, that is a fact.

Q. If a court had already fined the accused for the commission of the same malpractice, might you not think that a lesser fine would be in order because the amount of the deterrent would already have been increased by the amount of the court-imposed fine?

MR. WARREN: Your question assumes that he knows there has been such a fine?

MRS. SCUPI: Yes, if that were brought to his attention. Of course, he couldn't take it into consideration if he had no knowledge of it, could he?

THE WITNESS: I think the fact does exist that the line would have known about this in advance, that there were two system, two — one a court of law and the other a self-policing arrangement.

BY MRS. SCUPI:

Q. I am not getting into the double jeopardy question; I am simply talking about the amount of the fines. A. Yes.

1126 Q. I want to be clear; I am not criticizing you for fining a line which has already been fined by a court. There is no criticism whatever implied. I am simply asking you if, for example, you thought a fine of \$5,000 would be a good deterrent and you knew the accused had already been fined \$2500, say, by a court, whether you might take that into account in levying your fine.

1127 A. Well, I think there again it would depend on the nature of the matter.

I wouldn't say that we would not take it into consideration.

Q. You might? A. We might.

Q. All right. In Exhibit 5, which is States Marine's proposal — do you have that in front of you? A. Yes — no, I don't believe I do.

(A document was handed to the witness.)

BY MRS. SCUPI:

Q. At the bottom of page 8, the proposal reads:

"The neutral body and arbitrators reviewing its decisions shall impose or decline to impose fines with due regard to the nature and gravity of the violation involved, taking account particularly of the following considerations:"

And then there are listed seven considerations, some of which you mentioned spontaneously: the number of previous violations of the same or related type, the financial importance of the violation to the accused line, and some of which you agreed with me might be relevant. A. Yes.

Q. Whether the violation was innocently or purposely committed, whether the violation substantially offended the spirit of the conference

1128 agreement or was merely technical, whether a fine, penalty had been imposed or paid by the accused line for the same violation in a criminal or civil proceedings; and two others I believe that you aren't particularly interested in, whether the violation of the conference agreements also constituted a violation of law, and the fines or penalties customarily imposed by courts for offenses for comparable type and importance.

Those last two are Nos. 5 and 6.

Leaving those aside for the minute, will you have any objection to being directed by the conference to take the other criteria into account in levying your fines? A. No, basically not.

* * * * *

1131 Q. No, wait a minute. I want you to listen to my question. I am not asking what position you are constantly placed in; I am asking whether the adjudicatory function of the sort that the neutral body performs is a normal or a normally recognized function of the accounting fraternity?

* * * * *

MR. WARREN: Question, will you define adjudicatory?

MR. GALLAND: I said of the sort the neutral body performs.

THE WITNESS: An arbitrator, it is through the ordinary course of our professional activities. If that is what you mean by "adjudicatory function," then we are talking about the same thing.

BY MR. GALLAND:

Q. What kind of controversies do you refer to when you say that it is routine for you — I don't know whether you mean your company or your profession — to sit as arbitrators? A. Well, we are involved in them from time to time and I am not at liberty to disclose specific instances, but I can give you examples.

* * * * *

1132 A. We are asked to make decisions involving the accounting practices which stockholders, let us say major stockholders, 50-50 companies, for example, have. The accountants are often in between as an umpire as to what is fair accounting and as to what is available for dividends.

Another example is the split up of a corporation or the case of a merger of a corporation — of two corporations. We may be called upon to assess, examine and make a computation of the net worth of each company, or we may be called upon to be the umpire or referee in the split up of a corporation as to the value of assets, received. I think it is in the ordinary function of accountants. So this is an ordinary and not an unusual function of accountants.

Q. Right. Now the examples you have given me, which I think are satisfying examples, all have to do with the expertness that accountants cultivate in relation to which they practice their profession; is that not correct? A. That is right.

Q. Now, is it a routine function of accountancy to sit in judgment of people in the sense of administering fines, penalties and assessing damages?

1133 A. I would say it is not without their scope if work if they are so requested by a client.

* * * * *

1135 BY MR. GALLAND:

Q. Since the process of fitting in adjudication by way of administering punishment or penalties or fines or damages is not a normal or routine function of the accountancy profession, isn't it a fair conclusion that the ethical code of your organization wasn't written with any special reference to the ethics of judging? A. I didn't say that.

Q. I know you didn't say it. I am asking you for an answer to that question. This is not a set of judicial ethics? That is my question in brief.

THE WITNESS: Would you read his question again, please?

(The last two questions were read by the Reporter.)

THE WITNESS: I still contend that we are not judging this as an arbitration process.

BY MR. GALLAND:

Q. I asked you a question whether this was a set of judicial ethics?

Can you answer that question? A. This is a set of ethics for practice of the accountancy profession.

Q. Right.

Now, there is such a thing as a code of judicial ethics. It is published by the American Bar Association and universally recognized throughout the United States in any event as governing the conduct of judges. I would like to know whether in the conduct of your functions as neutral body you ever consulted that document?

THE WITNESS: Would you read the question, please.

(The pending question was read by the Reporter.)

THE WITNESS: No. We never at any time held ourselves out as anything but a firm of certified public accountants operating under the code, our code of ethics, and we don't intend to.

EXAMINER MARSHALL: Mr. Waldroup, that isn't the question.

THE WITNESS: I never consulted it, no. As a result —

* * * * *

1137 Q. My question is this, as to the part of the investigation you did perform, has there been any disruption of any evidence or any indication of an attempt to hide it or to phony it up? A. No, there was only a delay; if you wish the answer to that, there was only a delay in giving access.

Q. Yes, But despite the delay, you didn't find that anybody had made away with any evidence or doctored the records? A. Under those circumstances prevailing in that situation, I did not consider that such a possibility would exist in the first place.

Q. Will you answer the question? Did you find any evidence that anybody had hidden any evidence? A. No.

Q. Or built a bonfire or doctored it up? A. No.

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1142

REDIRECT EXAMINATION

BY MR. WARREN:

* * * * *

1154 A. ***Yes, the question was: "Where and how and what line do you draw with regard to a neutral body having a relationship with the accuser?" And the answer, by "indirect effect" I referred to the outcome of the investigation by the neutral body under the circumstances that that neutral body was the auditor for the accusing line. The indirect effect that I referred to was the salutary effect that the limitation of malpractices would be expected to have on the shipping industry if they could be restricted or controlled.

In other words, this is something that could not be measured directly, but it should improve his business as a whole if this situation can be controlled to a reasonable extent.

MR. WARREN: I have no further questions.

* * * * *

1163

JOHN TILNEY CARPENTER

was called as a rebuttal witness, and, having previously been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

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1199

Federal Maritime Commission
Room 114 Centennial Building
1321 H Street, Northwest
Washington, D. C.

Thursday, November 5, 1964

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1204

JOHN TILNEY CARPENTER

resumed the stand and testified further as follows:

CROSS-EXAMINATION

BY MR. WARREN:

* * * * *

1206

Q. Why did States Marine Lines care or concern itself whether Price, Waterhouse and Company in pursuing the complaint might have information unrelated to — A. We don't want to disclose our affairs to other people. It is as plain as that. I don't care who they are.

Q. You were not worried about Price, Waterhouse actually disclosing them? A. It could be anybody.

Q. In the second paragraph of Exhibit 35, if you would read that, please. A. Yes.

Q. I notice here that States Marine was also worried about roving examinations. A. Right.

Q. So says the statement. A. Correct.

Q. By the neutral body. Thus, it would appear that States Marine wanted its own auditors to prevent roving examinations. A. That is right.

Q. So I take it. A. If you are looking for a needle in the haystack, you get a man who knows where it is; not a man who does not know where to look.

1207

Q. So I take it in respect to this letter that you simply did not want Price, Waterhouse to go directly into your records and you preferred your own auditors to do so. A. Correct.

Q. Because of the fact that you wanted to prevent roving examinations and you did not want any unnecessary disclosure of your affairs.

A. Unnecessary disclosure to anybody, not by anybody, but to anybody.

Q. Would you please look at paragraph 3 of this exhibit and read it to yourself? A. Yes.

Q. Now, apparently it, or States Marine organization read article 25(3) of the existing agreement as not precluding the cooperation of Peat, Marwick and Mitchell? A. That is what it says.

Q. To carry out the matter Lowe, Bingham, and Thomson was delegated? A. Correct.

Q. All right, what did States Marine mean by cooperation?
A. The two auditors could work together and if you will see, I think an exhibit there where Mr. Houlihan worked out a whole formula of how the two sets of auditors —

1208 Q. I am aware of that. A. That is exactly what we had in mind.

Q. We will get to that later. A. That is what I am trying to say. You asked me what does this mean, the cooperation, and it means exactly what Mr. Houlihan put in writing.

* * * * *

1210 Q. So by the term "cooperation," is it not a fact that States Marine meant Peat, Marwick and Mitchell, its regular auditors were going to make the investigation and Price Waterhouse was not going to be permitted direct access to the books? A. Yes.

Q. Now, you said previously that the two of them were going to make the investigation together? A. Correct. They would collaborate as to just what should be looked for and how it should be done and the

1211 actual searching would be made by Peat, Marwick and Mitchell.

Q. No mistake about that. A. No mistake.

* * * * *

1234 Q. Can States Marine exercise an option under their policing system to use its own auditors for the investigation? A. What investigation?

1235 MR. GALLAND: I object.

BY MR. WARREN:

Q. In any investigation that might arise under the PCEC system?

A. I don't recall that there has been any call or request by the Pacific Coast/European Conference.

You would know better because you are counsel for them.

Q. Have they investigated States Marine?

MR. GALLAND: Object to that. That would be another case, if it existed, and I don't know whether —

MR. WARREN: I think you testified on direct examination.

EXAMINER MARSHALL: The witness may answer the question.

THE WITNESS: Yes, there have been investigations.

BY MR. WARREN:

Q. Has an assessment ever been imposed upon States Marine?

A. Oh, yes, indeed.

Q. What was the nature of it? A. One only a few months ago.

Q. What was the nature of the malpractice? A. No malpractice.

Q. What was the assessment imposed for? A. An alleged malpractice.

Q. And what did it consist of? A. The alleged malpractice consisted of rumors that States Marine's agent in Europe had given a rebate to somebody. The rumors were not based on any intelligible information.

1236 Q. Did States Marine pay the assessment? A. Yes, under protest.

* * * * *

1278 MR. MC SHEA: My question is in the realm of a hypothetical. I believe certain testimony has been developed on the record as to the inbound trade from Japan to the Pacific Coast, and also from the inbound trade from Japan to the Atlantic Gulf, and I would like — I think I have a

1279 right to ask the witness if he feels that if one trade — if rebating were more prevalent in one trade, whether that would be grounds for a system which is different in its nature and in its characteristics.

THE WITNESS: No. The accused should have the same right to a fair investigation and a fair trial and a fair right to appeal, regardless of how many rebates may be made by any other member in that trade. I don't see that quantity has anything to do with justice.

BY MR. MC SHEA:

Q. Do you think that factors of stability in a particular trade should bear any weight in determining what increments of the Neutral Body system will ultimately be approved? A. Well, if a Neutral Body system is inherently unfair, I think it makes for instability because States Marine Lines tendered its notice of resignation on the same point to both of these conferences.

Q. What comes first, the cart or the horse? A. I don't know. I would say that if you set up a good system of what I might call commercial justice, you are likely to remove a certain amount of instability in the trade.

1280 MR. GALLAND: The answer is that on inland waterways, the cart comes first. The horse is out back pushing. Otherwise, it is the horse.

* * * * *

1295

MAX BOYARSKY

was called as a witness, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GALLAND:

Q. Mr. Boyarsky, will you give your full name and state your occupation and your professional affiliations? A. My name is Max Boyarsky, I am a certified public accountant in the District of Columbia.

I am a member of the American Institute of Certified Public Accountants and the D. C. Institute of Certified Public Accountants.

Q. You do some auditing work from time to time for the law firm with which Mrs. Scupi and I are associated? A. Yes, I do.

Q. As a member of the AICPA, are you familiar with its code of ethics? A. Yes, I am.

Q. How long have you been engaged in the practice of accountancy? A. Since 1948.

* * * * *

1302 Q. And I now ask you to look at section 4.04 of the Canons of Ethics of the AICPA, and tell me whether you think that if you are functioning as a neutral body with power to fine your client, would it be incompatible with the exercise of your standard functions as a certified public accountant? A. In my opinion, it is an incompatibility.

Q. It is an incompatibility? A. Yes, it is.

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1308 CROSS-EXAMINATION

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1315 BY MR. MC SHEA:

Q. Mr. Boyarsky, if you were the regular auditor of Steamship Company X and you are aware that Steamship Company X belonged to one of the two respondent conferences in this proceeding and, as a regular auditor, you were called upon to go through the records of Steamship Company X to determine whether Steamship Company X had engaged in certain malpractices which may result in fines, would you disqualify yourself to perform that function? A. Yes, sir.

Q. You would disqualify yourself? A. Absolutely.

* * * * *

1316 BY MR. WARREN:

Q. You discussed Rule 1.01 on independence, and was it not in substance your testimony that the standards dictated by this rule on independence would preclude an accountant from operating as neutral body if the accountant had a professional relationship with either the accuser or the accused? A. This is my feeling, yes.

Q. Why? A. I think it is very simple, sir. One may strive to maintain integrity and I am sure does at all times. However, when it is a question of representing a company that pays you a handsome fee and you are asked to act as a neutral body while maintaining your standards of independence and being absolutely honest in every respect, it is a pretty difficult position to be in. That is why I said I would disqualify myself.

* * * * *

1318

BY MR. WARREN:

Q. Now, going to another subject, do I understand that while you favor the operation of the neutral body as being one, or a firm which is unconnected by reason of these professional relationships, you would, nevertheless, agree to the accused line's regular auditors performing the investigative work for the neutral body? A. No, sir, I did not say that.

Q. You disagree with that? A. I don't agree with the statement you just made.

Q. Would you please tell me in what respects it is incorrect?

A. Certainly, I said before that I would disqualify myself if I represented either the accused or the accuser, but what I meant, and this is what I think you are referring to, is the fact that I said it would be practical for the auditing firm that represents the accused, assuming that they are the regular auditing firm that belongs to the American Institute and adheres to the principles and codes that they set forth, to work in conjunction with
1319 a neutral body.

Q. What do you mean by work in conjunction with? A. I think that from the viewpoint of practicality, the firm that has been performing the auditing functions could work with another firm, that is, the neutral body, with staff members, develop the program, the audit program, to develop the information that they are seeking.

I would respect the integrity of both firms in this instance and I think from the viewpoint of practicality, it would be a good way to handle the situation like this, an audit of this nature.

Q. Would you under those circumstances concede the right of the neutral body itself to actually make the investigation, or would this be limited to the firm's own regular auditors, the physical investigation of the documents? A. I would not restrict them, certainly not.

* * * * *

1320 Q. Is it your view that the neutral body, when, under circumstances where the accused line's regular auditors are used, that the neutral body can, nevertheless, go directly into the company and make the actual investigation, notwithstanding the presence of the accused's own auditors?

A. I would agree with that, yes.

Q. You would not deny them that right?

1321 A. No.

Q. Why wouldn't you? A. Because I think in the situation you pose, I think this is, as I have stated before, it is not uncommon in the field of public accounting to work in conjunction with other firms on particular jobs. I have done it myself.

Q. Well, what do you think of a plan along this line which was in the context of this subject matter; namely, where you have a neutral body and it permits the accused line's own auditors to work along with the neutral body in connection with the investigation, but at all times the neutral body is there on the scene making the determination as to what documents are to be pulled and seeing to it that they are pulled; what do you think of that? A. I would have no objection to it.

* * * * *

1344

Federal Maritime Commission
Room 114 Centennial Building
1321 H Street, Northwest
Washington, D. C.

Friday, November 6, 1964

* * * * *

1347

REDIRECT EXAMINATION

* * * * *

BY MR. MC SHEA:

Q. Mr. Boyarsky, I am referring to my question on page 1315 of yesterday's transcript and I will read the question.

"Question: Mr. Boyarsky, if you were the regular auditor of Steamship Company X and you are aware that Steamship Company X belonged to one of the two respondent conferences in this proceeding and, as a regular auditor, you were called upon

to go through the records of Steamship Company X to determine whether Steamship Company X had engaged in certain malpractices which may result in fines, would you disqualify yourself to perform that function?"

"Answer: Yes, sir."

Now, you would disqualify yourself? A. Yes, sir, absolutely.

1348 Q. Mr. Boyarsky, do you draw any distinction between the situation called to your attention in the question and the situation where the regular auditor of Steamship Company X is assisting a neutral body in performing its self-policing functions by supplying the neutral body with certain accounts and records in the files of Steamship Company X?

A. Yes, I do draw a distinction between those two situations.

Q. Would you tell us what distinction you would draw? A. Yes, I tried to indicate that I felt that if the regular auditing firm that was engaged in conducting periodic audits of the records of Steamship Company X were acting in conjunction with the neutral body, which would be, of course, another auditing firm, I felt that this could be done. It would be an efficient way of performing an audit. The neutral body auditors would work in conjunction with the auditors regularly engaged by the steamship company. They mutually would determine what areas were to be covered that would be relevant, particularly to the issues that were being considered, rather than a firm coming in that was unfamiliar with the methods, the personnel and records of the company and would be starting, so to speak, from scratch. I feel it would be a more efficient way of doing it, and I certainly would not object to working in conjunction with an outside firm.

* * * * *

1358 BY MR. MC SHEA:

Q. Now, you are the regular auditors of Steamship Company X, and you are coordinating with the neutral body, and the neutral body asks you

1359 to go into the files of Steamship Company X and make certain reports based upon data contained in those files. Would you feel that it would be a

conflict of interest if you were given the option of exercising judgment in the utilization of those files to the extent that you may take certain material and you may not take certain other material? Would you feel that would be a conflict of interest if the neutral body left it up to your expertise to produce or to make copies of or to make records of certain accounts and figures which was not specifically delineated by the neutral body but was left to your general discretion? Do you understand that question?

A. I do.

Q. All right. A. I don't foresee the task being performed in the way that you outlined it. At least, we apparently don't visualize this type of situation in the same way. I would see the work being done by a neutral body acting in conjunction with the regular auditors for a particular company. Very possibly the personnel of both firms would be present during the conduct of the audit. Nobody would try to withhold anything if it were pertinent, but the important thing is that the audit program would be developed along the lines that would assure that pertinent material were pulled from the files and that the records that were examined were relevant to the issue, that people didn't come in without any pattern for examination,

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but perhaps might — because of their unfamiliarity with the records or the methods that the particular company is using — might waste a lot of time, unintentionally, perhaps, but still might waste a lot of time in trying to develop the material they are seeking.

Q. Do you think it would be desirable for the neutral body to have the representative in the Steamship Company X's office at the time that you, as the regular auditor, are obtaining the information from the files?

A. Yes, I do.

* * * * *

RECROSS EXAMINATION

BY MR. WARREN:

1375

Q. Right. Yesterday you mentioned that you thought that your own clients — I think you said your own clients — would resist disclosing records to you if the client thought or knew that he would be fined or penalized as a result of that. Is that correct? A. Possibly might.

1376 Q. Now, would you assume, starting from that premise, that from what you know of proposed Article 25 and its operation, that if given the chance that the memberslines, the shipping lines, perhaps not all, but some, might be inclined to secrete vital secrets if they knew they were going to be fined or violated? A. If they knew they were going to be fined?

Q. Well, if they had some information — A. Yes.

Q. And you were trying to get it, just as you would be trying to get it from your own clients. A. Yes.

Q. Don't you think that shipping lines would be likely to resist or secrete this information, some of them might? A. I think it is a possibility, yes.

Q. Now, I wonder this. In your opinion, based upon what you know of the operation of the proposed Article 25, how, if a complaint is required to be filed immediately with the shipping line, that is accused prior to the neutral body investigation, now, would this not eliminate surprise visitation and would not it be possible for the shipping line to conceal documents? A. Yes, I think it would be possible.

Q. In other words, if the complaint were immediately filed with the accused line, notifying them of the specific charge, before the investigation gets under way, you think there would be a possibility of secretion?

1377 A. Yes, I do.

* * * * *

1401 MR. WARREN: I would like to say at this time, as I indicated at the close of yesterday's hearing, that I anticipate in furtherance of our case to place on the stand a witness. In this case, it would be a professional witness. We are seeking, we have not finally been told precisely, we are seeking three possible witnesses. It is a question of accommodation.

* * * * *

I would anticipate, as things now look — and I very well may be able to inform you with precision this afternoon — that assuming the availability of the others and yourself, that Wednesday or Thursday of next week will be the time that we would be able to present such a witness.

* * * * *

1402

MR. MC SHEA:] The only objection I would have to Wednesday or Thursday of next week would be objections of timing of the pleading of the portion of this hearing with the Commission's action on the outstanding motions to clarify or alternatively to amend.

Now it seems to me that if we could arrange somehow to take the testimony of whoever Mr. Warren is going to obtain and right after that testimony to take the testimony of Mr. Carpenter on cross-examination on the issue of unanimity, if the Commission acts affirmatively on Mr. Galland's motion, and at the same time or a day or two consecutive days, take the testimony of whatever witnesses Hearing Counsel might call after reviewing the record as a whole and determining whether any public in-

1403

terest ideas have not been developed in an evidentiary manner, that we would be better off to say we are going to have a hearing next Wednesday or Thursday and perhaps the Commission will come out with an order two days later and then we will have to call Mr. Carpenter back and put on my witnesses.

It seems to me next Wednesday or Thursday is a little premature.

EXAMINER MARSHALL: Mr. Warren, what was your comment?

MR. WARREN: I am agreeable with the idea of perhaps at this time, in view of the pendency of the motion — of course, we don't know how it is going to be acted upon, we are not even sure whether it is going to be necessary to put on any additional evidence in that respect; namely, the unanimity respect. But in the interest of maybe consolidating the whole thing, I am perfectly agreeable to awaiting the outcome of the Commission's action so that we will know.

EXAMINER MARSHALL: Will it serve the convenience of the parties if we have some understanding of how soon after the Commission rules on the pending motion we will resume this hearing? For instance, if we perhaps can agree now that the continued hearing will be assumed ten days after the Commission rules on the motion?

MR. GALLAND: I will be prepared to go I would say a day or two after it rules, assuming Mr. Carpenter will be available. But since we don't know when that is going to be, I don't want to put him on the spot

1404 without consulting his convenience at the time. As far as I am concerned, I will be ready to go if I have a witness the moment the motion is decided.

EXAMINER MARSHALL: I, of course, will put out a notice for the time and place of the resumed hearing anyway. But I just thought it might be helpful to the parties to have some idea of how soon after the ruling they might wish to begin to get prepared.

* * * * *

EXAMINER MARSHALL: Yes. You have to start somewhere and I am suggesting that as a target proposition, ten days subsequent to ruling. If any party can't meet that or any other date appears to be at that time more preferable, why we will talk about it.

* * * * *

1405 EXAMINER MARSHALL: During off-the-record discussion, it was agreed that this hearing will be reconvened at approximately ten days after the Commission issues its ruling on States Marine Lines' pending motion to clarify or amend the order of investigation.

It is further agreed that opening briefs will be simultaneously filed by all parties approximately 30 days after close of the record in this proceeding, and that reply briefs will be simultaneously filed by all parties approximately 30 days thereafter.

The Examiner will issue actual notice of the time and place for the resumption of this hearing and for the filing of briefs.

Is there anything further?

MR. WARREN: Nothing on the record.

MR. GALLAND: I don't think so.

MR. MC SHEA: I have nothing.

* * * * *

(S E R V E D)
(NOVEMBER 19, 1964)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 1095

AGREEMENT NO. 150-21, TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
AND
AGREEMENT NO. 3103-17, JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

AMENDMENT OF ORDER REOPENING PROCEEDING

By its Report and Order in Docket 1095, served October 30, 1963, the Commission approved Agreement No. 150-21, a modification of the basic agreement of the Trans-Pacific Freight Conference of Japan, and Agreement No. 3103-17, a modification of the basic agreement of the Japan-Atlantic & Gulf Freight Conference. Among other things, these modifications revise the self-policing procedure ("neutral body" system) through which the conferences police the obligations of their members.

In protesting approval of these amendments States Marine, Inc. and Global Bulk Transport Corporation, member of both conferences, urged that the amendments could not be approved since they were not adopted by the unanimous consent of all conference members. States Marine and Global had opposed adoption of the amendments.

In its original notice of Hearing on Protest of Approval, served March 14, 1963, the Commission indicated that it was "particularly interested in receiving argument on the following question:

Does section 15, Shipping Act, 1916, require that modifications to agreements approved thereunder be adopted only upon unanimous vote of the parties to such approved agreement?"

Accordingly, this issue was before the Commission when it approved Agreement 150-21 and 3103-17. In its original report and order in Docket 1095, the Commission held that the lack of unanimous consent to a modification of a conference agreement, does not preclude the Commission from approving the said modification.

On November 9, 1963, States Marine Lines, Inc. and Global Bulk Transport Corporation, petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's Report and Order. Thereafter, the Commission moved the Court to remand the case to it, so that it might vacate its prior action and reopen and reconsider Docket No. 1095, pursuant to the authority vested in it by section 25 of the Shipping Act, 1916, and Commission Rule 16(a). The Court on March 16, 1964 granted this motion and remanded the case, "on consideration of [the Commission's] representation that the order [in Docket 1095] will be vacated by [the Commission] upon remand"

Thereafter, in an order served April 3, 1964, and amended May 15, 1964, the Commission reopened Docket 1095, vacated its original report and order in that proceeding, and instituted a general investigation into all pertinent aspects of the neutral body systems of the respondent conferences, including an inquiry "to determine whether or not Article 10, 12, and 25 [the neutral body provisions] of Agreements 150 and 3103, as they now stand approved by the Commission, and the proposed modification thereof embodied in Agreements 150-21 and 3103-17, respectively, are unjustly discriminatory or unfair, detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916; and whether they should be approved, disapproved or modified pursuant to section 15 of the Act."

The Commission directed that a full evidentiary hearing be held on the issues raised by its Order Reopening Proceeding.

During the course of the hearing in this proceeding, States Marine sought to introduce evidence on its contention that the provisions of the conference agreements here in issue are invalid for want of unanimous adoption. The Examiner refused to receive evidence on this issue on the grounds that the Commission's order reopening Docket 1095 directed an investigation of the conferences' neutral body provisions (Articles 10, 12, and 25) but made no mention of the conferences' voting procedure, embodied in Article 19 of the respective conference agreements.

Accordingly, States Marine on October 21, 1964 filed the present motion with the Commission to clarify, or alternatively to amend its Order Reopening Proceeding so that evidence may be received on the issue of whether or not the self-policing provisions of Agreements 150 and 3103 are invalid for lack of unanimous adoption.

Replies to the motion were filed by respondents Trans-Pacific Freight Conference of Japan, and Japan-Atlantic & Gulf Freight Conference; and by Hearing Counsel. Hearing Counsel, while taking the position that the Commission's Order Reopening Proceeding does not, in its present form, include unanimous voting as an issue, support States Marine's motion that the order be clarified or amended to encompass the unanimity issue.

The conferences oppose the motion on the grounds that this proceeding is solely concerned with the conferences' self-policing provisions, and not with its voting procedure. Since the voting procedures set forth in Article 19 of the conference agreements apply not only to the self-policing provisions of those agreements but to all other conference actions, respondents contend that to include the unanimity issue in this proceeding would unduly broaden its scope.

We believe the unanimity issue to be an important one in this proceeding, and one which must be considered by the Examiner and by the Commission.

The issue of unanimous voting cannot be artificially separated from the other issues pertaining to the validity of the conferences' self-policing system; for one of the grounds raised by States Marine in alleging that these provisions are invalid is that they were defectively executed because not unanimously agreed to.

This issue was considered by the Commission, and its determination that the lack of unanimous agreement did not render these amendments invalid was made a part of its first report and order.

In the appeal that followed, States Marine raised the unanimity issue in the Court of Appeals.

When the Commission vacated its first report and order, pursuant to its representation to the Court, that report and order was vacated as to all issues therein determined, including the issue of unanimous voting. There appears to be no reason to narrow the issues in this reopened proceeding, whose purpose is to investigate all pertinent aspects of the conferences' self-policing provisions. Whether or not these provisions are invalid for want of proper execution is a legitimate area of inquiry for the Commission. In consideration of the foregoing,

IT IS ORDERED, That the 3rd ordering paragraph of the Commission's order served April 3, 1964 in Docket 1095, as amended by its order in Docket 1095 served May 15, 1964, be further amended by adding at the end thereof the following:

"and to determine whether or not Section 15 of the Act requires that modifications to agreements approved thereunder be adopted only upon unanimous vote of the parties to such approved agreements;"

By the Commission.

/s/ Thomas Lisi
Secretary

(SEAL)

1406

Federal Maritime Commission
Room 114 Centennial Building
1321 H Street, Northwest
Washington, D. C.

Tuesday, December 15, 1964

* * * * *

PROCEEDINGS

1407

EXAMINER MARSHALL: On the record.

As everybody knows, this is a resumed hearing in Docket 1095, being Agreement No. 150-21, Trans-Pacific Freight Conference of Japan and Agreement No. 3103-17, Japan-Atlantic and Gulf Freight Conference.

Since our last session, the Commission has, as you well know, amended its order in this proceeding and I hand to the reporter a copy of the amending order and ask that the order portion thereof be copied into the transcript at this point.

(The Commission's order referred to is as follows:)

IT IS ORDERED, That the 3rd ordering paragraph of the Commission's order served April 3, 1964 in Docket 1095, as amended by its order in Docket 1095 served May 15, 1964, be further amended by adding at the end thereof the following:

"and to determine whether or not Section 15 of the Act requires that modifications to agreements approved thereunder be adopted only upon unanimous vote of the parties to such approved agreements;"

EXAMINER MARSHALL: Are there any preliminary matters?

Mr. Galland?

MR. GALLAND: The subject of the supplemental order just handed to the reporter has to do with the validity of the conference procedure for amending the conference agreement; specifically, whether it requires a unanimous vote or something else.

1408

We had planned to have Mr. Carpenter of The States Marine as a witness on that subject, but I learned yesterday that he has had to be taken to a hospital on short notice for surgery that will confine him in the hospital for at least a week, and I don't know what the period of convalescence beyond his release will be, and to the extent that this resumed hearing involves an inquiry as to the rules for amending the agreement, I am going to have to ask that we have a delayed session to be set when Mr. Carpenter can be with us.

EXAMINER MARSHALL: Yes. Well, Mr. Galland, it is, of course, regrettable but Mr. Carpenter is having this trouble and we will consider what further agreements may be necessary at the conclusion of such other action as may be taken in this proceeding.

There will be appropriate arrangements for Mr. Carpenter. Perhaps you can tell better what you want after the present witnesses have testified.

MR. GALLAND: Yes. I really can't tell now and I think Mr. McShea has some evidence to put in in connection with the enlarged issues in the case and maybe Mr. Carpenter can trail along at the end. I will try to work it out to suit everybody's convenience.

* * * * *

1410 MR. WARREN: Mr. Examiner, I would like to call Mr. Ralph S. Johns to the stand.
Whereupon,

RALPH S. JOHNS

was called as a witness, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WARREN:

Q. Mr. Johns, would you state your full name for the record, please?

A. Ralph S. Johns.

Q. What is your profession, Mr. Johns? A. I am in the practice of public accounting as a partner in the firm of Haskins & Sells.

1411 Q. In what office of Haskins & Sells are you located? A. Partner in charge of the Chicago office of the firm.

Q. How long have you been a practicing certified accountant?

A. Since 1926.

Q. Could you briefly indicate the nature of your firm's activities, Haskins & Sells? A. It is one of the largest national or international firms of certified public accountants, independent public accountants. We have offices in most of the principal cities of the United States and through affiliated partnerships are conducting a practice and represented in most countries of the Free World, including the Far East.

Q. Does the firm have any shipping clients? A. Yes.

Q. Would you name those clients? A. Farrell Lines, Isbrandtsen, States Steamship Company.

Q. Does your Chicago Office, is it retained by any of these clients?

A. No it does not.

1412 Q. Are you and your partners members of the American Institute of Certified Public Accountants? A. Yes.

Q. What is the Institute? A. The American Institute of Certified Public Accountants is a membership organization. Its members are individuals. It does not have provision for so-called firm membership. It is represented largely by certified public accountants in public practice.

Q. What would you say is its general objectives? A. Among its objectives are the maintenance of high standards in public accounting. That would include both technical standards and ethical standards, the encouragement of research, the maintenance of high standards for entrance into the accounting profession which would include the maintenance of suitable examination material, and it has an interest also in the educational processes leading up to interest in the profession.

Q. Approximately how many members are members of the Institute? A. Somewhere between 50,000 and 55,000.

* * * * *

1413 Q. Do you hold any positions with the Institute? A. Yes.

Q. Would you describe them? A. Currently, chairman of its committee on professional ethics and a member of its committee on relations with stock exchanges and the Securities and Exchange Commission.

* * * * *

1416 Q. In your opinion, is there any provision of the code of professional ethics which would sanction the performance of neutral body functions by a member CPA? A. Well, there is no specific provision in the code as we have never endeavored to itemize specifically what things a CPA could be authorized to do or itemize. On the other hand, what CPA's would not be authorized to do because the profession has been changing over the years, but we do have an article in our code which refers to other professional services and which might be performed by public accountants, and the primary purpose of that one, namely Article 4.05, says that in whatever professional services are rendered, the accountant must observe our code of professional ethics. I would conclude, therefore, that the function of

neutral body would not be precluded by anything which appears presently in our code of professional ethics.

1417 Q. Now, suppose your firm was appointed neutral body under proposed Article 25. What would prevent it from, if anything, from divulging the fruits of a neutral body investigation which it might make to a competitor of the accused? A. Well, first of all the very nature of the professional practice of accounting is that we keep confidential the information which is obtained from our work and aside from that self-imposed professional obligation we have, it appearing in our code I believe, Article 1.03, that imposes upon the members of the American Institute, the obligation to retain confidential the relationship between himself and his client and then, based upon your supposition under proposed Article 25, it is my recollection that there is language contained in that proposal which imposes upon the neutral body the matter of keeping information confidential.

Q. In your opinion, to what does the standard of independence refer, found under Article 1.01 of the code — if you will turn to that, please.

A. Article 1.01 which is referred to as your independence article has, for its primary purpose, that any conclusions reached by a certified public accountant should be objective conclusions, particularly where the general public or third parties might, in one way or another, rely upon the accountant's conclusions.

1418 Q. Suppose an accountant was asked to express an opinion in regard to a financial statement in regard to an enterprise in which it owned an equity of a sort. Would that in any way impede or destroy independence under this article? A. Yes, it would.

* * * * *

Q. Suppose, Mr. Johns, that your firm represented two separate enterprises that were competitors, and suppose that you were asked in respect to one such enterprise to express an opinion regarding a financial statement of that enterprise.

In your opinion, would the fact that you have a professional auditing client relationship with the competitor enterprise destroy the independence which you are required to have in respect to the other enterprise?

A. No, it would not. Professional relationship, as long as we are independent, professional relationship does not destroy independence. It is

1419 a common situation among the larger accounting firms to serve two or more competing enterprises and in my own personal experience in Chicago, not only do we, as the same firm, serve the two largest farm implement corporations, but we serve them right out of the same office and have done so for over 50 years.

Q. There is nothing common then in the profession among accountants representing competing enterprises? A. Just miss one word — nothing what?

Q. Nothing uncommon. A. No. It is a common practice to serve competing enterprises in view of the fact that we are independent professional people.

Q. Suppose, Mr. Johns, that your firm were appointed neutral body under proposed Article 25 and you were asked by your client, States Steamship, to investigate the XYZ line pursuant to the machinery set up under the proposed Article 25. In your opinion would you cease to be independent because of your professional relationship with the accusing line, in this instance I am assuming States Steam?

1420 A. In my opinion, we would not have our independence impaired because the complaint originated with State Steamship nor would we lose our independence under any language in our code of professional ethics as I interpret Article 25 — we would be operating under provisions of a conference agreement with the conference as a client and it would be immaterial whether the originating information came from States Steamship or any other of the member lines.

Q. Suppose that, in acting as a neutral body, you were retained by the accused line, the one that you are going to investigate. What would your answer be in respect to the independent concept? A. Technically, under our definition of independence, we would not lose our independence but I favor the proposed language of Article 25 wherein the neutral body would not be required to render the service under those circumstances.

Q. May I ask why you favor the language in the proposed article to that effect? A. Well, from a practical business point of view, a certified public accountant does not want to be obliged to enter into a relationship with his client which presumably is a favorable one which has a fairly high probability of becoming an antagonistic situation.

* * * * *

1422 Q. Suppose in a given situation that, in fact, you were investigating your own client. Is it conceivable under any provision of the code that you might violate the code of ethics by reason of the professional relationship between you and your own client in that instance when you are acting as neutral body?

1423 THE WITNESS: The rule 1.03 regarding the confidential relationship between accountant and the client has to be — what shall we say — there has to be an exception where if the court of competent jurisdiction subpoenas working papers and things of that type, but I believe for rendering service like that of a neutral body such information developed from an annual audit would have to be kept confidential unless the client himself released the accountant from that provision.

* * * * *

1426 CROSS-EXAMINATION

BY MR. GALLAND:

* * * * *

1428 Q. In your own activity as a certified public accountant, which I understand dates from 1926, have you, yourself, ever performed any judging functions of the kind that the neutral body exercises under Article 25, either present or proposed? A. The closest function to that is that of arbitrator. My office has, on two occasions, and within the past ten years, been invited to serve as arbitrator.

Q. I wanted to know whether in your personal experience you had ever participated in the process of judging as provided for in Article 25. This has to do with your own personal experience. A. Not precisely the same as what is provided as a neutral body in Article 25. But when I refer

to the two items of arbitration, Haskins & Sells' Chicago office was designated in the agreement between the parties and I, as the partner in charge of the office, designated one of my partners to function as arbitrator. To that extent, I participated.

Q. The answer is that you did not do the arbitrating. A. I did not do the arbitrating.

Q. And you have never sat as a judge determining controversies or imposing punishments. A. Not of the type embodied in Article 25. I have sat in judgment of my fellow accountants on occasion.

1429 Q. As a member of the — A. Professional Ethics Committee.

Q. Of the Committee on Ethics. A. Yes.

* * * * *

Q. Now, how about sitting in judgment of your competitors? Have you ever done that? A. Yes, sir.

Q. And the competitors upon whom you sat in judgment were competitors in the sense that all certified public accountants are competitors of all others? A. In either sense, that sense or the sense that the so-called eight national firms are very definitely in competition with one another.

* * * * *

1430 Q. And you say you have sat in judgment on the conduct of members of those firms? A. Yes.

Q. Have you sat in judgment upon such people as the complaint of any of your own colleagues? When I say "your own colleagues" I mean members of your firm? A. I don't believe so. I cannot recall any.

Q. How would you feel about that situation if a complaint of improper professional behavior were lodged against a partner of Price, Waterhouse by a partner of Haskins & Sells? A. I don't believe that would preclude my serving. In other words, it is not a question of the source of the complaint. It is a question of the facts, whether the facts support a prima facie case.

* * * * *

1431 Q. Suppose you, yourself, had a complaint against a partner of Price, Waterhouse. Could you lodge that complaint with the ethics committee and then sit in judgment of it? A. Yes.

MR. GALLAND: No further questions.

* * * * *

BY MR. MC SHEA:

Q. * * * Now, if a member of one of these other firms were to serve as an arbitrator in a complaint against your own firm, how would you feel about this? Would this possibly have any problems for you?

A. I don't know of any problems.

Q. In other words, you would accept this, is that right, sir?

A. That is right.

* * * * *

1433 Q. Let's take, for example, States Steam. Assuming States Steam was accused of a violation and you were the regular auditors for States Steam, would you feel that you would be in anyway at cross-purposes in going through the accounts and records of States Steam to obtain information that would be used by a neutral body? A. Well, I think I explained that, that I would prefer not to be put in that position. In other words, I would regard it as an awkward one, not one that is in violation of this code of professional ethics, but awkward one from a business point of view because generally we like to think we are having cordial relations with our clients and that would have the possibility of something other than cordial relations.

* * * * *

1494 ROYAL W. SKILES

was called as a witness and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MC SHEA:

Q. Please state your name for the record.

* * * * *

1495 A. Royal W. Skiles.

Q. Whom are you employed by, Mr. Skiles? A. In the Bureau of Foreign Regulations, Division of Carrier Agreements, Federal Maritime Commission.

* * * * *

1496 Q. What have been your duties in your present job? What are your duties? A. I am an agreements examiner.

Q. In the performance of these duties, would you give us some indication of what you do? A. We receive and examine all types of agreements filed pursuant to Section 15, Shipping Act of 1916, as amended; make recommendations to the Commission or to other persons for action thereon under that section; handle miscellaneous duties, conferences, and so forth, with filing parties prior to approval to see that the agreements'

1497 forms are approvable under that section.

* * * * *

1500 EXAMINER MARSHALL: Mr. Warren, do you wish to state your objection?

1501 MR. WARREN: Well, my objection goes to this question of, in looking at the Commission's amended order, the question posed under the Section 15 requirement, "Modifications Be Adopted Only Upon Unanimous Vote".

On page 3 of the Commission's order, it is stated in part:

"States Marine sought to introduce evidence on its contention that the provisions of the conference agreements here in issue are invalid for want of unanimous adoption."

The Examiner refused to receive such evidence.

Then further down in the next paragraph, it is stated that:

" . . . proceedings so that evidence may be received on the issue of whether or not self-policing provisions of" -- these agreements -- "are invalid for lack of unanimous adoption."

There is another reference in the order on page 4 in which it is said that, second paragraph:

"The issue of unanimous voting cannot be artificially separated from the other issues pertaining to the validity of the conference's self-policing system; for one of the grounds raised by States Marine in alleging that these provisions are invalid is that they were defectively executed because not unanimously agreed to."

1502 This issue of unanimity was considered in the precise form in Docket 1095 for remand. The issue was stated exactly as it is now stated. The Commission, as I interpret and read its decision before the remand, treated it as a legal question and made a determination upon the consideration it was a legal question.

Now, States Marine, it is true, raised the unanimity issue in the Court of Appeals in its petition to review case 18227, and on page 7 of its petition for review, it made certain contentions regarding this issue, those contentions again boiling down to the sole point of the fact States Marine voted against this thing.

It seems to me the way the issue is posed by the Commission, in light of the clauses appearing in the amended order, in light of how the Commission previously considered it, in light of how States Marine previously argued it in its petition for review, that the evidence relevant for purposes of answering the Commission's question in the amended order is evidence showing, on the one hand, that the conference, pursuant to its voting rules, approved of the pending modifications.

On the other hand, States Marine would, it seems, have the option of showing States Marine did not vote for this. Hence, necessarily, in evidence there is a factual base showing lack of unanimity.

Then upon that, it would seem to me that the legal question should be briefed.

1503 I question the relevancy of showing what the voting procedures are in other conferences and in going into all facets for purposes of answering that sole question.

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1504 In its extended order, the Commission did not ask, for example, is the less-than-unanimous rule — which is the majority rule the conference now has — has that been effectuated in a manner that may be detrimental to commerce or unfair between carriers? It just said section 15 requires unanimity.

1505 It seems to me once we get factual evidence showing States Marine voted against it, if that is the case, the majority voted for it, section 15 required this; it is a matter of law.

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1516 MR. MC SHEA: I would hope to obtain a stipulation as to the admissibility of all of these documents.

EXAMINER MARSHALL: Very well, Go ahead.

MR. MC SHEA: Are you willing to stipulate or not?

MR. WARREN: No, I am not.

I have said what I consider relevant evidence as far as this issue as posed by the Commission and in the light of the history of the thing. I am not willing to broaden it beyond what the Commission has said.

I think the only relevant evidence is whether States Marine voted against this and whether the majority pursuant to conference rules voted for it. On that factual basis, we can then determine whether or not this Section 15 required unanimity as a matter of law.

EXAMINER MARSHALL: Yes, Mr. Galland.

MR. GALLAND: We want to join with public counsel, perhaps go beyond public counsel, in advocating the receipt of this material. I haven't seen it before. We have expressed an interest in it. We understand that the records of the two respondent conferences are not identical, but we think there is information in these minutes that will show, at least in the case of one conference, possibly to some extent in the case of the other, that up to the time when they passed a rule gagging themselves so that they couldn't show how many people voted which way, that when it came to amending the conference agreement, the votes in nearly all instances were unanimous.

1517

We think that is an important historic fact to show, because Mr. Warren has said at various times in this proceeding, and I think the first time in the oral argument before the Commission when this docket was previously up for arguing, that unless the conferences have the flexibility which a less-than-unanimous vote provides, they can't function. I think the historical record, as far as it extends and has been permitted to extend, would refute that contention.

1518 MR. WARREN: I haven't made any contention in this proceeding, Mr. Galland, so far, on unanimity.

MR. GALLAND: Well, I think we can locate the contention I am just referring to.

MR. WARREN: I am talking about in this proceeding.

MR. GALLAND: I am looking here at something, oral argument, Docket 1095, and Mr. Warren there said to the Commission — this is page 16 of the oral argument:

"Now certainly we do not believe that the present voting rule, which is the two-thirds voting rule, can be cancelled, voided or modified or disapproved in this proceeding for the same reason that I have been discussing before. The fact is that the Commission must have the opportunity to examine the workability of the two-thirds rule. It has no evidence before it on this point. It cannot in the abstract state that a two-thirds rule is contrary to the Shipping Act; it must be based upon an evidentiary record before that determination can be made."

Now, we think the evidentiary record that shows a long course of amendment by votes that were unanimous or substantially so, were unanimous in most instances, has some probative value.

EXAMINER MARSHALL: Yes. I do, too. Certainly it is relevant for consideration of what is workable to show what is done, what the practices are and have been, and how they worked out. It is difficult to say that something can't be done if it is being done, or vice versa.

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1549 MR. WARREN: Do I understand Mr. Galland will present a witness, Mr. Carpenter, at a later time?

EXAMINER MARSHALL: Yes. That is the last word I had.

Is there anything further at this time with regard to this particular proceeding?

MR. GALLAND: How about Mr. Warren? Is he going to present a witness?

MR. WARREN: I may. I want to take a look at some of this and I want to consider his stipulation and make a determination.

MR. GALLAND: And if you have a witness, will you tell us whether it will be the conference chairman?

MR. WARREN: No, I can't. I think that is a little premature at this time, but he will be a knowledgeable witness.

1550 EXAMINER MARSHALL: This will be a witness, Mr. Warren, with regard to specifically what?

I realize you said you wanted to review some of this material and to decide, but can you go any further than that?

MR. WARREN: That is a good question, except that relating to the unanimity issue, depending on what that issue embraces. Is that enough at this time?

EXAMINER MARSHALL: Yes. I think you are really saying that you may need a rebuttal witness for Mr. Carpenter, aren't you?

MR. WARREN: I think so. That is basically what I am getting at, but I am not even sure we will need that, and I certainly won't present him if I don't think we need him.

EXAMINER MARSHALL: Well, Mr. Galland, would you be good enough to let all parties know when -- and I realize you don't know at this time, but when Mr. Carpenter can comfortably and safely and conveniently be available?

MR. GALLAND: I will keep everybody informed as to what Mr. Carpenter's prospects are.

EXAMINER MARSHALL: Very well.

(Whereupon, at 4:25 o'clock p.m., the hearing in the above-entitled matter was adjourned sine die.)

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1551

Federal Maritime Commission
Room 114 Centennial Building
1321 H Street, Northwest
Washington, D. C.

Tuesday, February 16, 1965

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1553

PROCEEDINGS

EXAMINER MARSHALL: As you all know, this is the resumed hearing in Federal Maritime Commission Docket No. 1095.

Does anyone have any preliminary matters?

MR. WARREN: Mr. Examiner, before Mr. Carpenter assumes the stand, I take it he will testify in this case; I would like to place in evidence in this case two exhibits which we regard as important, showing the latest position of these two conferences in respect to the pending modifications at such time as —

EXAMINER MARSHALL: Are these proposed amendments to the presently proposed amendments?

MR. WARREN: Yes, they are, Mr. Examiner.

EXAMINER MARSHALL: Mr. Galland?

MR. GALLAND: I've been having a fight, or at least the first installment of it, about the amendments to the amendments. They were adopted, I think, at a meeting of January 8th, maybe January the 12th, and were sent in immediately afterward with a request for approval. And on January 19th, I wrote a letter on behalf of States Marine indicating that the amendments were not agreed to by States Marine, although they were filed in the usual form, which implied that they had been agreed to by everybody. And I said that they changed the situation that was under review in this proceeding, and I asked that, in order that this proceeding be permitted to proceed to a sensible conclusion on some particular state of facts, that the processing

1554 of the amendments be held up until guidelines were established as to the rules that should apply as a result of the decision in this case.

I have had no answer to that letter. I did call Mr. — Well, I modify that. I had the standard answer, which said that my letter had been received and I would be hearing something further. And in accordance with standard procedure, I have heard nothing further.

So I called Mr. Levenstein the other day and he said that a recommendation had gone forth to the Commission to the effect that these amendments should be added to this proceeding. But I have no information that that recommendation has yet been acted upon.

And my position as of now is that the amendments are not a part of this proceeding, and I don't think Mr. Warren should be introducing evidence for his side at this point if States Marine holds the floor for the moment to put in some testimony from Mr. Carpenter.

If, when Mr. Warren's turn comes, he wants to identify the amendments and offer them, I am prepared to withhold my objections until that time and to make them at that time.

EXAMINER MARSHALL: I think your objection is timely at this time.

MR. WARREN: Mr. Examiner, I haven't finished. I really hadn't stated my position.

1555

EXAMINER MARSHALL: Yes, indeed.

Mr. Warren, these further amendments, are they identified as yet by the Maritime Commission or anyone else? In other words, do you have a dash-number for them?

MR. WARREN: No. They stand in precisely the same posture, as I understand it, as the previous amendment, which was introduced in an exhibit in this proceeding, deleting the word "probably", which was an amendment to the amendment.

EXAMINER MARSHALL: Yes.

MR. WARREN: And we think that this is relevant to show the latest position of this conference at this time.

These amendments are precisely responsive to the hearing record and to States Marine's and some of Hearing Counsel's objections. And this is the philosophy behind the amendments, and we think that they should be

identified and accepted into evidence as relevant in this proceeding at this time.

Mr. Carpenter is going to assume the stand. Mr. Carpenter, if Mr. Galland wants to examine him on the amendments can go forward, and anything they want to put in regarding the amendments they will have an opportunity.

Now, in respect to whether or not the order of investigation has to be amended, in my own mind I am not certain, in fact, whether it does. But should, in the event ultimately the Commission amend the order, then we have no problem. States Marine would have had their hearing. As a

1556 matter of fact, they have already had their hearing in the record on these amendments as far as I am concerned, but I am willing to give them all the chance they want to talk about these amendments.

Now, should the Commission ultimately come out and say that these amendments are not to be included as a part of the proceeding, then of course the whole record regarding this will be stricken.

I think as an expedient matter in the same manner and vein in which the exhibit regarding the word "probably" was put in, the same reasoning and philosophy should prevail here.

EXAMINER MARSHALL: Mr. Galland, have you had, in your opinion, reasonable opportunity to consider the substance of these further amendments?

In other words, are you familiar with them?

MR. GALLAND: Yes, I know what they say.

In answer to the question you put to Mr. Warren, whether they had been assigned a number; the answer, on the basis of Mr. Levenstein's letter to me of January 25th, is that the TPFCJ amendment is 150-29 and the Japan-Atlantic amendment is 3103-26.

I don't claim I am caught by surprise as to the general substance of the amendments. I haven't tried to master them in detail.

1557 The basic thing they do I consider to be an affront on the part of the conferences, because the amendments provide for a lesser degree of

neutrality even than required by the amendments that are officially under review. Their principal change is to provide that a neutral body will be considered neutral even if it is the regularly employed general auditor for an accusing party, the only disqualification being if it has a financial interest in one of the lines involved.

In other words, an auditor that was the regular auditor for United States Lines would be perfectly well qualified to be a neutral body on the ground that its employment contract was irrelevant, but if it owned one share of stock out of several million issued shares in United States Lines, it would be disqualified.

I consider that to be an absurdity on its face, and if we are going to consider that type of amendment, then we have to have conference witnesses again and go into the whole donnybrook all over.

EXAMINER MARSHALL: I take it on these it is your present feeling that the proposed further amendments do not materially bridge the gap between your position and Mr. Warren's position?

MR. GALLAND: They don't materially bridge it in any respect, and they materially widen it on the basic issue in controversy.

EXAMINER MARSHALL: Does Hearing Counsel wish to say anything?

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MR. MC SHEA: If I might be heard on that point, Mr. Examiner, we feel that whatever is the most recent position of the conference, whether it is a precedent position or entrenched position, whatever it should be, it should be received into evidence in this proceeding.

And with regard to the point that Mr. Galland has raised that States Marine did not vote for the most recent amendments which have been offered by Mr. Warren and that, therefore, according to the position of States Marine the amendments, the modifications were adopted on less than unanimity, which, according to the position of States Marine is unlawful, it just seems to me that, until the Commission ultimately determines this case, or this particular issue, that what has prevailed in the past should be the guideline. And since what has been prevailing in the past has been less than unanimity, that until there is a final determination of this, that we should

consider less than unanimity as the rule until the Commission determines otherwise, if it so does as a result of this proceeding.

And for that reason it seems to me that we should have in the record in this case whatever is the last position of the conference, whatever is the ultimate position of the conference. And upon the representation of Mr. Warren, it is Agreements No. 150-29 and 3103-26.

1559 And if Mr. Warren is precluded from offering these documents in evidence for the reason that he intends to not proceed any further, then we will offer the documents into evidence, notwithstanding any action which might be taken by the Bureau of Foreign Regulation as to possible amendment of the order of investigation and noticing these documents in the Federal Register, if he so determines to do.

MR. WARREN: Mr. Examiner —

EXAMINER MARSHALL: Do you wish to add anything, Mr. Warren?

MR. WARREN: Well, of course, we pointedly deny that this is an attempt to strengthen the neutral body system against the interests of States Marine. The amendments and modifications presented herein are an absolute concession to States Marine, and this is the sole reason that they are offered in this proceeding. They are predicated absolutely upon the hearing record in this proceeding.

For example, there is a specifically incorporated statute of limitation modification in here. States Marine has argued for this in its own submission and referred to it also in the hearing record.

In addition to that, States Marine made a great play on the ambiguity between Article 10 and 25, the overlap situation. They did not know who would proceed for what cause under each Article.

1560 The amendment to Article 10 is intended to clarify that in every respect.

In addition, there are other amendments regarding carriers where the whole hearing provision has been knocked out, and greater rights guaranteed, and elucidated upon specifically in line with States Marine's objection; one of which comes to mind is its contention that a tentative finding of

guilt preceded the hearing which it was accorded. All of this has been removed.

It is the most ludicrous thing I have ever heard of to contend these amendments are a device to prejudice States Marine, when they are intended for the welfare of States Marine as concessions.

I feel that they should be, and I should be permitted to identify them at this time, and as I have said before, should the hearing record, should the Commission feel a modification to the order is necessary, then we will know at that time. But in the meantime, Mr. Carpenter is free to testify on these things in the expedition of the hearing.

MR. GALLAND: The answer the order of investigation answers all this.

EXAMINER MARSHALL: Mr. Galland is, in my opinion, technically correct. The order of investigation is very specific. I do not think that it is within my authority to expand it to include further amendments.

Moreover, to follow that course, leaving the door open for amendments, further amendments, additional amendments, at any time, you would never finish this hearing.

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MR. WARREN: Mr. Examiner —

EXAMINER MARSHALL: I will not receive the amendments at this time. If the Commission's order is amended, of course I am governed by that.

Mr. McShea, you may govern yourself accordingly.

I would like to say that I would permit it if there could be a stipulation between all parties, but I am still faced with the limitations of the Commission's order.

I appreciate your position, Mr. Warren, that, if the Commission does not expand its order, or renders a negative ruling, that we would then, in effect, strike that portion of the record that goes to these amendments. But I am just not going to go into that.

We will proceed on the consideration of the amendments in evidence up to this time.

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MR. WARREN: I would like to ask you this, alternatively, Mr. Examiner: In respect to these modifications, cannot they be offered into evidence at this time on the premise that they reflect the latest position of the conference, for that reason?

EXAMINER MARSHALL: You can get them in the record as an offer of proof, if you want to.

MR. WARREN: I would like to have them identified.

EXAMINER MARSHALL: They are not going to be accepted as evidence in this proceeding.

MR. WARREN: I would like to have them identified at this time.

EXAMINER MARSHALL: May I have copies?

MR. WARREN: Mr. Examiner, in respect to the two documents just handed the reporter and distributed to all parties, I ask that they be identified as the next exhibits in line; namely, Trans-Pacific Freight Conference Confidential Memo, Circular No. TPF-6/65 and attachments, and Japan-Atlantic and Gulf Freight Conference, Confidential Memo, Circular No. JAG-4/65 and attachments.

MR. GALLAND: I request that the identification of documents and everything that has to do with Mr. Warren's case be deferred until Mr. Warren's turn comes.

1563

MR. WARREN: For what?

EXAMINER MARSHALL: Until Mr. Warren's what?

MR. GALLAND: Until his turn comes. I don't mind putting Mr. Carpenter on first. I am prepared to do it. If Mr. Warren has a case to put on first, then I think it is in order to do what he is doing. But otherwise, I don't see why we shouldn't proceed with the hearing on the anticipated basis of dealing with the unanimity issue, as to which I have a witness available and I am prepared to proceed.

EXAMINER MARSHALL: Let's be done with this little problem since we have already gotten into it.

Now, Mr. Warren, are you offering these as an offer of proof?

MR. WARREN: For identification at this time.

EXAMINER MARSHALL: The documents referred to will be marked for identification as Exhibits No. 82 and 83, respectively.

MR. GALLAND: 82 is TPFCJ, right?

EXAMINER MARSHALL: That is correct. TPF-6/65.

(The documents were marked for identification as Exhibit No.s 82 and 83.)

MR. WARREN: And I presume as an offer of proof also, Mr. Examiner. I move that they be accepted as an offer of proof, with the understanding that you have denied my request to admit them into evidence in this proceeding.

1564 EXAMINER MARSHALL: They are received as an offer of proof only, and will have no evidentiary value in this proceeding.

* * * * *

1572 JOHN T. CARPENTER

was called as a witness, and, having been previously duly sworn, was examined and testified further as follows:

EXAMINER MARSHALL: Mr. Carpenter, you are still sworn.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

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1573 BY MR. GALLAND

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Q. As to the amendments currently under investigation, the ones to which States Marine is objecting, did States Marine vote for either of those amendments? A. They did not.

Q. Did it vote against them? A. It did.

Q. Does the process of amending conference agreements for which States Marine is a party, without States Marine's consent, have any effect upon the ability of States Marine's officers to exercise management control? A. Yes, it does.

Q. And in what way? A. We appraise them of the confidence in being able to conduct States Marine's business in accordance with the board

of directors and managerial decisions. It puts the whole conference scheme in the hands of competitors.

1574 Q. Does it have any effect on the ability of States Marine's officers to determine the contractual commitments whereby States Marine will be bound? A. Yes.

Q. Will you elaborate slightly as to how that comes about?

A. Well, as distinguished from rate matters, that is, the setting of the level of rates and that sort of thing. I am referring now to what you referred to, and that is these -21 in the Trans-Pacific and -17, the Japan-Atlantic and Gulf. Those are amendments to the basic agreement. That is the charter of organization.

And members, in my opinion — certainly speaking for States Marine — have the right to know and rely upon that charter of organization as being the basic system under which it acts in the Japan trades homewards to the United States, as long as it remains a member, and to give to competitors in any conference the right to change the charter of organization against a member's will is, to my mind, a destruction of the whole conference system. Because it deprives — as I say, it deprives States Marine or other members of the knowledge of what they are doing and what they can do in the future.

Q. Do you know of any situation other than the one involved here where States Marine finds itself bound as a party to any contract that its management did not sign or authorize? A. Other than the level of rates and that sort of thing, I would say No. We may not agree on certain levels of rates, but that is a minor matter compared with the basic principles of the contract.

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Q. Are you aware of any restriction on the nature or the scope of the amendments the conference —

MR. WARREN: Mr. Reporter, would you repeat that? I could not hear the last part.

(Pending segment of question read by reporter.)

BY MR. GALLAND:

Q. — is permitted to effectuate by the voting procedures under Agreement 150 or 3103? A. Well, if I understand your question, that these agreements as they now exist and have been operative for a period of time permit two-thirds of a quorum to change or amend the basic conference agreement.

Q. And what I want to know —

1576 A. The quorum is a majority. Two-thirds of a quorum is eight-fifteenths. So that eight-fifteenths of these conferences have the ostensible power to amend the whole thing at their whim.

Q. And my specific question is: Is there any limitation as to the manner in which they can amend the agreement? A. No limitation at all, unless there should be some regulatory body that steps in and prevents it from being approved under section 15.

Q. So that the subject matter of the amendment can, as far as the language of the agreement is concerned, be anything that anybody chooses to write into it? A. That is correct.

Q. Has States Marine ever been subjected to any legal penalties as the result of conference action which States Marine has opposed? A. Yes.

Q. Will you tell in what connection? A. Well, in connection with the Trans-Pacific Freight Conference of Japan some years ago, when they set up the neutral body system, not with the present neutral body of Arthur Young, but with Lowe, Bingham, Thomson as neutral body. I need not go into that in detail, because it was the subject of a formal complaint made by States Marine Lines to the Federal Maritime Commission and you know the docket. I can't remember. I think — well, I don't remember it.

Q. Docket 920.

1577 A. Well, at any rate the result of that hearing, as affirmed by the Ninth Circuit Court of Appeals, was that the appointment of Lowe, Bingham, Thomson as neutral body was illegal, their activities were unlawful, and the results of their decisions were wiped out. They had levied fines against States Marine Lines in successive progression.

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THE WITNESS: As the result of that, the Federal Government filed suit for penalties under section 15 of the Shipping Act of 1916 against all of the members of the Trans-Pacific Freight Conference of Japan, including States Marine Lines itself. That was later settled, and States Marine Lines contributed to the settlement, as it was a defendant in that action

1578 for penalties under section 15 brought by the Government.

BY MR. GALLAND:

Q. In connection with that settlement, did States Marine Lines make representations to the Justice Department that it should not be penalized because it had opposed what the neutral body had done? A. Yes, we did.

Q. Did that argument directed to the Justice Department prevail? Did the Justice Department accept that proposition? A. No.

Q. And States Marine was compelled to contribute to the settlement, is that what your testimony is? A. That is correct.

Q. Do you consider that, by the process of being bound by amendments it opposes, States Marine becomes subjected to the risk of guilt by association if the conference takes illegal action? A. That's what happens.

Q. Does States Marine object to being placed in that position of exposure? A. Very much so.

Q. Do you regard this as a continuing hazard for States Marine as long as agreements are amendable and binding on it without its consent? A. Yes.

1579 Q. In the respondent conferences in this case, are the votes in conference meetings tallied and recorded? A. No.

Q. What kind of notations are made by way of indicating action taken in the conference minutes? A. They are reflected in the conference minutes. Sometimes it says, "Motion made, seconded and carried", and so and so, without tabulating the votes or mentioning any dissent.

Sometimes it is the same formula but with the addition of the words "by secret ballot."

Q. Under that type of conference procedure, if an action is taken which States Marine deems illegal and States Marine dissents from the action, is there any conference record which shows the States Marine dissent? A. No.

1580 Q. And in those circumstances would States Marine have any way of proving its lack of assent, other than by the testimony of whoever it's representative was as to how he voted? A. That is the only way, a recollection of the testimony of whoever voted.

Q. And if that man became available, would there be any means whatever of proving the vote? A. No.

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Q. When the amendments presently under review; that is, amendments 21 and 17, were presented to the Commission for approval, was the Commission informed by either conference that States Marine had opposed the amendments? A. No.

Q. At the present time, Mr. Carpenter, do the two respondent conferences have a dual rate system in force? A. No, they do not.

Q. Have they applied to the Commission for authority to inaugurate a dual rate system?

MR. WARREN: Objection. Relevancy. Dual rate has no bearing in the case.

EXAMINER MARSHALL: The witness may answer.

1581 THE WITNESS: Yes.

BY MR. GALLAND:

Q. Has that permission been granted? A. Conditionally, yes.

Q. What are the conditions in general? A. Certain conditions that the conference should conform to the standard type of dual rate or merchants contract which the Commission has inaugurated for use by, or decided upon for the use of all conferences that wish the dual rate system.

Q. So that as the record stands, these conferences are now at liberty to meet the required conditions and inaugurate a dual rate system? A. Provided they amend the contract the way the Maritime Commission has told them they may do. Not that they must do, but that they may do.

The Commission -- in my answer, going on -- I do not recall of the Commission telling them they had to adopt a dual rate system, but, if they do adopt it, this is the form of agreement that they shall use.

BY MR. GALLAND:

Q. Yes. They are free to adopt it by meeting certain conditions?

A. Right.

Q. And when a conference does adopt a dual rate system, does it affect the economic freedom of a particular line to be in or out of the conference?

1582 A. Yes, it does.

Q. Will you explain how? First of all, take it in two jumps. Does it affect the legal freedom to resign? A. It does not affect the legal freedom to resign, no. It affects the consequences.

Q. All right. Does it affect the economic freedom? A. Yes.

Q. Explain in what way. A. Well, this dual rate system is one common name for what is also called the merchants rate contract system, but it is an exclusive patronage system. In other words, the shippers who sign the dual rate and get the benefit of the lower rate in return for the contract, the shippers who sign the contract agree that they will patronize the conference members exclusively, having freedom to use what conference members they choose to use in their transportation requirements, but not to go outside of the conference group, go outside the conference group, this non-conference which is faced with an exclusive patronage contract from the shippers.

Q. So that if a line resigns from a conference or is not a member of a conference, then the shippers who have signed conference contracts would be subject to penalty by patronizing the outside, is that right?

A. That is right.

1583 Q. And does that situation create economic incentive or pressure on a particular line to remain in the conference or to be in a conference that has the system? A. Yes, it does.

Q. Even where there is no dual rate system enforced, is it economically advantageous to a carrier to be in a conference or disadvantageous to be out? A. Well, that depends on the conference, Mr. Galland, on the

individual conditions of the trade and of the managerial decisions of the particular steamship company. But by and large, it is the view of States Marine that it is of much greater value to belong to a conference than not to.

Q. Is it the desire of States Marine to remain a member of the two respondent conferences if that can be done consistent with States Marine's other obligations? A. It is our desire, yes, sir.

Q. Is it States Marine's desire to see that the conferences maintain a set of conditions under which States Marine will feel free to remain a member of the conference? A. Yes.

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1584

BY MR. GALLAND:

Q. What conferences in the westernly direction are the opposite numbers of the two conferences involved in this case? A. The Pacific West-bound Conference, running from Pacific Coast ports to Japan, and the Far East Conference, running from Atlantic and Gulf ports to Japan.

Q. And they also include other destinations then the Far East, do they not? A. Yes, sir.

Q. What is the situation in those conferences as to the requirement of unanimous agreement for the adoption of amendments? A. Amendments in both those conferences can be adopted only by unanimous vote of the members.

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Q. Are you aware, Mr. Carpenter, of any situation except in the two respondent conferences where States Marine has ever been made a party to an agreement or an amendment to an agreement against the company's will? A. I don't recall any. I don't think any exists or has existed in the time I have been with the company, which is 17 years.

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CROSS-EXAMINATION

BY MR. MC SHEA:

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1593 Q. What, if any, effect upon the problems that States Marine has faced in this regard and with regard to any possible future problems of this nature would be a Commission determination that respondent conferences must maintain in their minutes voting results, including dissents? A. Well, the dissenter is put into the untenable position, or almost untenable position, because it has to explain to the powers that be, whether it is the Department of Justice or the courts or the Commission, that it did not agree to what was going on. But there again, it is faced with the charge of being guilty by association. If the records show that it dissented, then it has some means of proving that it should not be penalized, at least to the extent that those who promoted the actions should be.

Q. Would such a requirement be welcomed by States Marine?

A. Yes, very much.

What I object to particularly is the way in which this appearance of unanimity is given in the manner in which these amendments which we are talking about are filed. It is a letter from the Secretary or Chairman to the Federal Maritime Commission, and then it lists the names of all

1594 the members of the conference, and followed by the name of the chairman on behalf of them. It gives a wholly false appearance.

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1601 CROSS-EXAMINATION (resumed)

BY MR. WARREN:

* * * * *

1611 Q. Mr. Carpenter, why is it that States Marine wants the actual vote reflected in the minutes of the conference; namely, that States Marine was against a particular amendment? Why? A. Which time of voting do you have in mind, sir, that you refer to in the question?

Q. On the agreement or any kind of vote. A. Any kind? We are not against it in any kind.

Q. Oh, it is just as to changes in the amendment? A. Oh, yes. The voting on ratemaking and that sort of thing, we have no objection.

Q. How has the other hurt you, the fact that it is not reflected?

A. I think I tried to testify that it gives an air and the false appearance of acquiescence in something which goes before the regulatory body of the Federal Maritime Commission for approval which we disapprove of, and thereby puts us in a very difficult position or, as you lawyers call it, not being estopped to defend a position that we've taken in the conference.

* * * * *

Q. Has anyone ever countered the proposition in this proceeding that States Marine voted against modifications? A. I'll put it this way, Mr. Warren, that we had to clear the record to show, in order to make our protests of any avail, we had to produce evidence or testimony
1612 that we did not approve, in conference meetings, the things which we are asking the Federal Maritime Commission to disapprove; in other words, to try and straighten out a record which on its face is misleading, a half-true and maybe utterly false.

* * * * *

1619 Q. Mr. Carpenter, do you know whether or not it is normal practice in the case of voluntary associations to require unanimity before their constitutions or their agreements can be amended? A. No. It depends upon the —

Q. Association? A. Upon the decision of the members. I did once belong to a meeting of the Quakers, the Society of Friends in Montclair, New Jersey, where they had less than unanimous for doing anything, but if it was not unanimous, they said it wasn't worth doing.

* * * * *

1628 EXAMINER MARSHALL: Now, that brings us, I presume, to the stipulation, if any.

MR. MC SHEA: Yes.

EXAMINER MARSHALL: Have you had a chance to go over that yet, Mr. Galland, the stipulation?

MR. MC SHEA: I don't believe anybody has seen it yet.

* * * * *

1636 EXAMINER MARSHALL: Well, now, bearing in mind that in my thinking I have the right to take official notice of the contents of those files anyway, would counsel care to stipulate receipt in evidence of such a report; of course, stating in the record the outline of the report which would be substantially what you have already done, Mr. Galland? Do you want to stipulate this report to be prepared, stipulate at this time as to its receipt in the record?

MR. GALLAND: Can we go off the record for a minute?

EXAMINER MARSHALL: Yes.

(Discussion off the record.)

EXAMINER MARSHALL: Back on the record.

MR. WARREN: Mr. Examiner, I am going to request that the record in this proceeding be held open until the Commission has come to a decision on whether or not it is necessary to modify the outstanding order to bring in the proposed amendments, the latest ones passed by the conference.

1637 Following Mr. Galland's communication today, or statement to you, I learned that he had filed a protest to Mr. William A. Stiegler, Bureau of Foreign Regulation, in regard to these particular proposed modifications. I asked Hearing Counsel that he furnish me a copy of this protest, dated January 19, 1965. It refers throughout to Docket 1095, and it is an action designed to influence officials in the Maritime Commission with respect to whether or not this subject matter should be included in this proceeding or not. And for that reason, on its face I regard it as an ex parte communication, and under all standards of fairness should have been presented to me.

I now understand perhaps why the Commission is not taking any action, since it got our amendments at least by January 9th, and this protest came in January 19th, and this is the first we have heard about it. I say it is perfectly all right for Mr. Galland to correspond with other officials of the Maritime Commission so long as it does not pertain to this proceeding.

And on its face this letter is throughout designed to influence the particular official, Mr. William A. Stiegler, as to whether or not this would be a feasible action.

And I am going to ask that this be filed as a late-filed exhibit, as a matter of fact. I would like it in this record. We received no copy, and no notification of it whatsoever. And it would be my intention to send an immediate reply to Mr. Stiegler with copies to all parties regarding what

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the conference considers this situation to be.

So while I am in sympathy with the idea of this record being closed, I certainly am — I feel that we have gone too far at this late stage to close it under these circumstances.

EXAMINER MARSHALL: Well, whether the record is closed technically or not closed isn't too material. The Commission by its ruling can order a record open or closed as the case may be.

MR. WARREN: Except for one thing. Mr. Examiner, once the hearing is closed as a practical matter it is very possible the Commission may be influenced by that fact. That is why I request that it at least be held open for some time, at least pending my action.

EXAMINER MARSHALL: I don't subscribe to your worry about that, but I will keep the record open.

Now, on this stipulation thing, do you suppose that you could reach the point of accomplishment or failure definitely one way or the other — within how long a period of time, Mr. McShea? A week, ten days, two weeks?

* * * * *

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MR. MC SHEA: I would think that by two weeks from yesterday, Monday, whatever that Monday happens to be, the first of March.

* * * * *

EXAMINER MARSHALL: Well, why don't we agree to reconvene March the first and either receive the stipulation or consider it; if you have been unable to arrive at a stipulation, to consider the exhibits now marked, will have to consider for introduction, received in evidence, and I will certainly consider further exhibits as Mr. Warren has considered he wishes to offer.

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You may offer them now, if you wish.

MR. WARREN: Well, I will wait until that time, if it is all right at that time, at the meeting on March 1.

* * * * *

1640 EXAMINER MARSHALL: Will March the third be agreeable — Mr. Galland, is March third agreeable to you?

MR. GALLAND: I can't think of anything I've got. I don't have my calendar with me.

* * * * *

EXAMINER MARSHALL: All right, March third.

* * * * *

1644 MR. WARREN: Mr. Examiner, I asked the question of what happened to Exhibit 55 that Hearing Counsel introduced.

EXAMINER MARSHALL: The conference voting requirements?

MR. WARREN: Yes, sir.

MR. MC SHEA: It was not received into evidence for the reason —

1645 EXAMINER MARSHALL: No, it has not been received into evidence.

MR. MC SHEA: It was offered and it was not received into evidence for the reason that Mr. Skiles did not have sufficient information to satisfy the Examiner that all the voting requirements were in fact set forth.

MR. WARREN: I would like to state on the record that I withdraw any objection that I have made to that exhibit, Exhibit 55.

MR. MC SHEA: It is possible when we come back on the third of March that I will be able to provide sufficient information to be in position to reintroduce Exhibit 55.

* * * * *

MR. GALLAND: I have a comment on the openness of the record or the closing of the record.

We think that States Marine is entitled to get a decision as to what constitutes an acceptable neutral body in terms of neutrality and in terms of the procedures that are followed. We have a big fat hearing up to now on one set of amendments.

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EXAMINER MARSHALL: Mr. Galland, excuse me for interrupting. I pretty well know, I am sure, what your position is, what you have in mind. Let me make this suggestion.

We are not going to do anything, are not going to close the record until, of course, this session we anticipate on March 3rd. Therefore, why don't we just wait until then, and maybe you won't have to make a speech at all.

Maybe the Commission may have decided by then what the status of the amendments to the amendments should be.

MR. GALLAND: Incidentally, I understand that the conference is now about to consider amendments to the amendments to the amendments. By this process the conference can keep us from ever getting anything decided, and States Marine remains hung up with a dubious neutral body system at the moment, to be sure that Agreements 21 and 17 haven't yet been approved, and the next ones haven't yet been approved, and the next ones haven't been yet voted on.

But it seems to me that it represents —

MR. WARREN: Mr. Examiner, I move that we adjourn.

MR. GALLAND: — that it represents an important public policy to get these cases ended. And I don't think the conference should be permitted to keep skipping ahead of everybody trying to catch up to it and get a decision.

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That is why I asked that the record be closed except for the purpose of receiving any stipulation that may be executed by the parties.

EXAMINER MARSHALL: Well, there may be more to do than that. It may not reach a stipulation. I don't think any purpose will be served by conditionally closing it. Frankly, it will give the Commission a reason for expediting its judgment on this interim issue.

MR. GALLAND: Well, I want my request on the record anyhow that the record be not held open for the purpose of starting a new or further hearing on issues that are not in this hearing.

EXAMINER MARSHALL: You may be assured that I am not going to start a further hearing on issues that are not in this proceeding, unless I am instructed by the Commission to do so. In fact, I have no authority to do that. I am bound by the Commission's present order. Until that is changed, I have no leeway.

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Room 147 Centennial Building
1321 H Street, Northwest
Washington, D. C.

Wednesday, March 3, 1965

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1652

PROCEEDINGS

EXAMINER MARSHALL: On the record.

I think we are here today to consider receipt of a stipulation, if any.

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EXAMINER MARSHALL: I think that completes the list except for the one — Exhibit No. 55, Mr. McShea. Do you want to take that one up?

MR. MC SHEA: Yes, sir.

At the hearing on December 15, 1964, I presented as a witness Mr. Royal Skiles of the Bureau of Foreign Regulation of the Commission, and offered through Mr. Skiles a document entitled "Voting Requirements and Approved Conference Agreements With Ratemaking Authority, to be in Effect as of August 31, 1963." Upon cross-examination of Mr. Skiles, it

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appeared at that time that Mr. Skiles was not aware as to whether in each instance, under the heading "Voting Requirements," whether the voting requirements that he had listed under that column were in fact voting requirements of the respective conferences and rate-fixing bodies on amendments to basic conference agreements.

Within two days from today, I believe Mr. Skiles will have prepared a similar schedule, differing in two respects. One respect is that it will be effective as of today. The second difference will be that it will in fact reflect voting on amendments to basic agreements of the conferences listed on Exhibit 55 for identification, and any subsequent conferences that may

have been formed in the meantime, and with the deletion of any conferences or rate-fixing bodies which may have ceased to have existed since August 31, 1965.

Therefore, I propose in the first instance either to have the Examiner take official notice of the files of the Bureau of Foreign Regulation with regard to voting requirements, and that all parties stipulate to the receipt in evidence as a late-filed exhibit of the schedule to be prepared by Mr. Skiles, which could be inserted in the place of the present 55, in which case I will withdraw 55 and have it inserted in place of 55.

EXAMINER MARSHALL: Actually, you propose to withdraw 55 at this time, do you not?

1664 MR. MC SHEA: That is right, sir, propose to withdraw 55 at this time.

* * * * *

1665 EXAMINER MARSHALL: I am going to ask that that be submitted as a late-filed exhibit. If you find serious fault with it, Mr. Galland, you can move to strike it.

MR. GALLAND: Well, how can you admit a document that is not in existence and that you haven't seen? I think we've got to see it first, Mr. Examiner.

EXAMINER MARSHALL: I can take official notice of the files —

MR. GALLAND: I don't mind that a bit.

EXAMINER MARSHALL: — from which this information is drawn. It is to reflect nothing except the information that is contained in those files. There is no commentary; it is not a thing that can be varied or given a coloration or slant in any direction.

* * * * *

1671 MRS. SCUPI: Yes. We request a stipulation from Mr. McShea and from Mr. Warren that, with respect to the amendments that were adopted at the meeting of November 25, 1951, the minutes that were just introduced in evidence as Exhibit No. 90 by Mr. Warren —

1671 MR. MC SHEA: You mean October 25.

MRS. SCUPI: I beg your pardon; October 25, 1951.

— the minutes were just introduced in evidence as Exhibit No. 90 by Mr. Warren, and they pertain to Amendment No. 4, as you can see from Exhibit No. 88. Amendment No. 4 was adopted in various stages by the conferences in approximately three meetings. That appears on the first page of Exhibit No. 88.

We request a stipulation from Mr. McShea and from Mr. Warren that Amendment No. 4 was not approved by the Federal Maritime Commission, and that on June 20, 1952, the file on the amendment was closed before approval.

* * * * *

1673 MRS. SCUPI: Mr. Warren, you have just introduced into evidence the minutes of a meeting to show the vote on certain amendments that were adopted by the conference. It seems to us every bit as relevant to see what happened to these amendments as to see how they were adopted.

Furthermore, we believe that this information is relevant because Amendment No. 150-4 is the only amendment to which there was recorded opposition. And we think it is significant that that amendment was not approved by the Federal Maritime Commission.

MR. WARREN: I will not stipulate.

* * * * *

1674 EXAMINER MARSHALL: I think we can shortcut this if you wish to. Mrs. Scupi, you gained this information from Mr. Hollifield?

MRS. SCUPI: That is correct.

EXAMINER MARSHALL: Is Mr. Hollifield an employee of the Maritime Commission?

MR. MC SHEA: Yes, he is.

EXAMINER MARSHALL: Is he in this building?

1675 MR. MC SHEA: Yes, he is.

EXAMINER MARSHALL: Go get him.

* * * * *

ROBERT HOLLIFIELD

was called as a witness, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MC SHEA:

Q. By whom are you employed, Mr. Hollifield? A. Where?

Q. Yes. A. I'm employed in the Division of Carrier Agreements of the Federal Maritime Commission.

Q. What do you do to these? A. I am an Agreements Examiner generally.

Q. What are your duties as Agreements Examiner? A. To review the agreements to see that they are pursuant to the provisions of Section 15 and related provisions.

Q. Do you have before you a card file one of which indicates action taken by the Commission on June 20, 1952? A. Yes, I do.

1676 Q. With reference to the Trans-Pacific Freight Conference of Japan Agreement No. 150-4, is that right, sir? A. That's correct.

Q. What, if any, indication does that card show to you what action was taken by the Commission with regard to Amendment No. 4? A. Well, the card says the Amendment No. 4 was closed before approval on June 20, 1952.

Q. Do you recall what Amendment 150-4 related to substantively? A. Substantively, no, I don't recall what it related to.

Q. What would the designation "closed" on the card file call to your mind? A. To my mind it means that it did not — was not acted upon by the Commission, that it was disqualified for certain reasons.

Q. Does that mean that the Commission necessarily disqualified it or the conference might have withdrawn it? A. Either.

* * * * *

1691 MR. WARREN: * * * Mr. Examiner, the last item, there has been identified in evidence Exhibits 82 and 83, which we have made the subject of an offer of proof.

1692 EXAMINER MARSHALL: Yes.

MR. WARREN: States Marine's attorney, page 1553 of the transcript, stated that States Marine voted against all of these revisions contained in 82 and 83. In light of that consideration, and in light of what the exhibits are, I ask at this time that those two exhibits be admitted into evidence for the sole limited purpose of showing evidence of States Marine Lines' motivations in opposing the said conference provisions.

MR. GALLAND: I object on the ground that it doesn't show anything about States Marine's motivation in opposing.

I object also on the ground that, whatever States Marine's motivation may have been in opposing, these latest amendments have not yet been made a part of this case, don't constitute a part of this case. This case is not concerned with what States Marine has done or may do or ought to do with respect to any agreements that are the subject of the pending inquiry.

EXAMINER MARSHALL: Do you wish to add anything, Mr. Hearing Counsel?

MR. MC SHEA: Exhibits 82 and 83, are they the most recent?

EXAMINER MARSHALL: They are the amendments to the amendments, so-called.

1693 MR. MC SHEA: The ones which are pending before the Commission now?

MR. WARREN: I am not asking they be brought into evidence for anything except one limited purpose.

MR. MC SHEA: In other words, you are not asking the Examiner to reconsider his ruling when he refused to receive them in evidence?

MR. WARREN: I am not.

MR. MC SHEA: You are stating a second ground of relevance and materiality?

MR. WARREN: Yes.

MR. MC SHEA: And that is that 82 and 83 somehow set forth a motivation of States Marine?

MR. WARREN: Considered in the light of States Marine's admission at page 1553 of the record that it voted against these resolutions, which is already part of the record.

MR. MC SHEA: I still don't get the tie-in to the motivation.

MR. WARREN: Well, I am saying we can — that's a question of argument.

MR. MC SHEA: What is the point that can be argued? I mean I'm trying to find out. I am just trying to get at the point of your second grounds of relevancy, and apparently some argument can be raised. What argument can conceivably be raised as a result of the proposed modifications?

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MR. WARREN: A question of States Marine's motivations in opposing the amendments, motivations having been ruled as relevant in the proceeding.

MR. GALLAND: If States Marine had been a member of the conspiracy to blow up the Washington Monument, I'm sure it would have been heavily motivated, but it wouldn't necessarily have been a relevant fact to prove on this record.

MR. MC SHEA: I'm afraid I have to join in the objection, Mr. Examiner.

EXAMINER MARSHALL: I am going to overrule the objection. 82 and 83 will be received, but for the very specifically limited purpose indicated by Mr. Warren. And they are in no way in this record for purposes of proving or disproving.

MR. GALLAND: Well, may we have a statement as to what motivation it shows or what part of what agreement shows any motivation at all?

(Exhibit Nos. 82 and 83 were received in evidence.)

EXAMINER MARSHALL: Mr. Warren is, I'm quite sure, quite accurate in his recollection of an earlier ruling that I made wherein I said an indication of motive was relevant in arguing his objection to an exhibit offered by hearing counsel, I believe. I think it has some relevancy, Mr. Galland.

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MR. GALLAND: I am in a state of total bafflement. I want to know what part of what agreement shows anything about motivation. We know from the fact that States Marine voted against them that it didn't like them. Now, what can you point to anywhere in either of the amendments that shows anything about States Marine's motivation? If they are going into evidence, I am entitled to call somebody to testify the contrary of whatever it is that they are supposed to show, but I can't do that unless I know what they do show.

What does it show about States Marine's motivations?

MR. WARREN: The Examiner having made his ruling, Mr. Examiner, I would like to call Mr. Hollifield to the stand.

EXAMINER MARSHALL: Well, Mr. Galland is entitled to clear his thinking up a bit. I am presuming, Mr. Galland, that this goes to Mr. Warren's earlier contention on the record that the amendments to the amendments were motivated by a desire to bridge the gap between — what is the word? I forget it. Not pacify.

MR. GALLAND: Mollify?

EXAMINER MARSHALL: No. It is an effort toward doing away with those things that you find difficult to make these things more acceptable to you.

MR. GALLAND: He made it more acceptable by saying that the neutral body can be even less neutral under the newest amendments than it is under the other amendments.

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MR. WARREN: Well, that, of course, is the argument that you probably will make.

EXAMINER MARSHALL: Isn't that the purpose that you have in mind?

MR. WARREN: That is the sole purpose, Mr. Examiner. And this question of argument beyond that.

EXAMINER MARSHALL: What is the word that I can't find?

MR. WARREN: Concessions? Clarify?

EXAMINER MARSHALL: No.

MR. GALLAND: What Mr. Warren has been saying is what the conference's motive was in drafting these amendments. I hardly think Mr. Warren as attorney can testify to that, but anyhow, what he said does bear on the conference's motive, but nothing he has said bears in any way on States Marine's motive.

MR. MC SHEA: Are you saying this, Mr. Warren, that States Marine voted against the first amendments, then they voted against the second amendments, so therefore they voted against what you think to be a compromise position; is that right?

MR. WARREN: Yes, that's part of it.

MR. GALLAND: Nobody discussed these —

EXAMINER MARSHALL: Very well, I think we've done with that subject.

1697 MR. GALLAND: Well, I want to take the stand, then, and testify as to what I know about States Marine's motivation in relation to these amendments. He is not entitled to keep putting on testimony that isn't subject to rebuttal. I am going to ask Mrs. Scupi to call me to the stand and ask me some questions that will permit me to give answers that bear upon the States Marine motivation.

* * * * *

1702

GEORGE F. GALLAND

was recalled to the stand as a witness, and, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

MR. GALLAND: At least a part of States Marine's motivation in voting against the amendments most recently submitted for approval to Agreements 3103 and 150 was based upon my advice to that effect. That advice was based chiefly upon my observation that, under the latest amendments, the attributes required of the neutral body seemed to be very considerably diminished.

As I understand the new amendments, they provide that the only type of relationship between a neutral body and any conference member which can conceivably be disqualifying is a financial interest by the neutral body

in the conference line, and that a retainer or employment relationship is, under no circumstances, disqualifying.

What that meant to me at the time of my inspection of these amendments and what it means to me now is, by way of example, that, if the neutral body were Arthur Andersen & Company and if Arthur Andersen

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and Company owned one share of stock of the United States Lines, a company whose securities are publicly and widely held, the ownership of that one share of stock would be, or at least could be, disqualifying; but that, if Arthur Andersen & Company were the general auditors for United States Lines Company, and even if a major share of Arthur Andersen's income depended upon its relationship as auditor to United States Lines Company, that relationship would not in any circumstances be disqualifying.

I advised States Marine, and believe persuaded them, that any such basis for determining neutrality was wholly unrealistic and made a mockery of the concept of neutrality. And apart from anything else that may be achieved by the amendments, I felt that they were so far defective and they indicated particularly that States Marine ought to vote against them.

As regards the other changes which are represented by Mr. Warren as concessions to States Marine, I found them so unsubstantial or so illusory that they did not merit States Marine's support.

I felt also that the issues in this case had to be crystallized at some point and that, in order to get a decision that would lay down the guidelines for neutral body qualifications and procedures, it was necessary to progress these cases to decision within the framework of the existing issues.

* * * * *

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MR. WARREN: Mr. Examiner, my request was that the record be held open pending the Commission's determination, which is forthcoming, there being, it would seem to me, since I have nothing further — and I assume Mr. Galland does not — that it would be in a state of suspension; in other words, until the Commission has determined, if the Commission, of course, denies the motion, as far as I'm concerned, the proceeding is over.

On the other hand, should they grant it, then you would not have to reopen the motion, the proceeding.

* * * * *

1705 EXAMINER MARSHALL: I am going to close the record as of the conclusion of this proceeding, subject only to the receipt of the two exhibits specified in the record to be filed as late-filed exhibits not later than this time Friday.

I do this because of several things, but, in general, it is a bad practice to leave a record open. I'm afraid its meaning could be distorted for other uses.

1706 There is no technical problem. The Commission, if it grants the motion to clarify or amend its order, of course is wholly empowered to open the record, and in that event would do so.

* * * * *

1712 Is there anything further?

If not, this hearing is concluded, and the record is closed, except for two exhibits to be late-filed this coming Friday.

(Whereupon, at 3:02 o'clock p.m., the hearing was concluded.)

* * * * *

COPY OF
FEDERAL MARITIME COMMISSION
AGREEMENT NO. 150-21

MEMORANDUM OF AMENDMENT
TO TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
AGREEMENT NO. 150 AS AMENDED

MEMORANDUM OF AMENDMENT approved March 14, 1962 at Regular Meeting held in the city of Tokyo, by the members signatory to the Trans-Pacific Freight Conference Agreement No. 150 as amended.

WITNESSETH:

WHEREAS the members of the Trans-Pacific Freight Conference of Japan are parties to an Agreement designated Federal Maritime Board Agreement No. 150, as amended, and approved by the Federal Maritime Board and/or its predecessors in the administration of the Shipping Act of 1916 (said Agreement as so amended and approved hereinafter referred to as the "Conference Agreement"), and

WHEREAS the members desire to again amend the Conference Agreement.

NOW THEREFORE THE SAID AGREEMENT IS AMENDED AS FOLLOWS:

First: Articles 10, 12 and 25 of the Conference Agreement are hereby stricken from the Conference Agreement.

Second: Articles 10, 12 and 25 as hereinafter set forth shall be added to and substituted respectively for the said Articles deleted, as follows:

Article 10. BREACH OF AGREEMENT

(a) Except as provided in Articles 25 and 30 hereof and as otherwise agreed upon for specific breaches covered by Conference Resolution passed in conformity with the provisions of the basic agreement, in the event of any breach of this Agreement by a member and/or its agents, such member shall be subject to the payment of damages for each and every such breach. The determination of a breach and the amount of damages payable therefor shall be decided and assessed by vote of the Conference

under Article 19 hereof; provided however that the member charged with breach shall not have a vote.

If the member committing the alleged breach of this Agreement is dissatisfied with the decision, such member shall have the right to appeal, in which event the questions of breach of the Agreement and damages shall be left to the determination of three arbitrators to be nominated within thirty (30) days from the date of receipt of said member's appeal at the Conference office.

One arbitrator shall be nominated by two-thirds of the members, excluding the member charged with breach, one by the member charged and the third shall be appointed by agreement of the two arbitrators so nominated. The arbitrators shall make their award by decision of two or more of them, and the award shall be final and binding on all members. There shall be no appeal against the award of the arbitrators. Nothing contained in this agreement shall interfere with the rights of any member line under the provisions of the Shipping Act, 1916, as amended, or the jurisdiction of the Federal Maritime Commission under said Act or any other pertinent Federal laws.

(b) In lieu of or in addition to the payment of damages, the offending member, at the option of the Conference, shall be subject to expulsion from the Conference or suspension of voting and other rights for such period of time as the Conference may determine. The determination of breach and assessment of the penalty of expulsion or suspension and, if suspension, the duration thereof, shall be in accordance with paragraph (a) above.

(c) In no case shall the member complained against have any vote in the determination of any of the foregoing matters. The member complained against shall have the right to be heard and to offer a defense against the allegations even though such member shall not be afforded the right to vote on the matter.

(d) No expulsion shall become effective, until and unless notice thereof, with a detailed statement of the reason or reasons therefor, shall have been airmailed or cabled to the United States governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended. Notice of suspension of voting rights pursuant to this Article shall be furnished promptly by airmail or cable to the aforementioned governmental agency.

Article 12. FAITHFUL PERFORMANCE

(a) As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or any award of the Neutral Body or any other award or judgment which may be rendered against them hereunder, the members agree to post and maintain with the conference the sum of Twenty-Five Thousand Dollars (\$25,000.00) in United States currency or United States Government Bonds, which shall be deposited or invested as may be agreed by the parties pursuant to Article 19.

(b) In lieu of United States currency or United States Government Bonds provided for in the preceding paragraph a member may post and maintain with the conference one or more irrevocable letters of credit in the total sum of Twenty-Five Thousand Dollars (\$25,000.00); provided that those letters of credit create an absolute obligation for the bank to pay against drafts drawn by the conference chairman or the Neutral Body accompanied by a debit note bearing a date not later than "thirty (30) days prior to said notice and, in the case of a Neutral Body assessment, a copy of the Neutral Body report; and further provided, that no other conditions for payment may be inserted in such letters of credit; that they are at all times maintained in the total sum of Twenty-Five Thousand Dollars (\$25,000.00); and that they are in all other respects satisfactory to the conference.

(c) The deposits and letters of credit provided for in paragraphs (a) and (b), and the proceeds thereof, if any, shall be applied to the payment of any dues, damages or Neutral Body assessments payable under Articles 10 and 25 or elsewhere in the agreement, unless fully paid or previously satisfied before they become delinquent in accordance with Article 28 hereof. In the event a letter of credit is posted in lieu of United States currency or United States Government Bonds, the Neutral Body will have the authority to draw drafts under the credit, accompanied by a copy of its report finding a breach and assessing damages and also a copy of the delinquent debit note, and to receive payment of the amount assessed from the bank on behalf of the conference.

(d) In the event of the termination of this agreement or termination of a membership or withdrawal of any of the members, the deposits made by the members concerned shall be returned to them, together with any accrued interest in the possession of the Conference, or in the case of letters of credit, they will be revoked, but only after any indebtedness to the conference has been fully satisfied and three (3) months have elapsed from the date of termination or withdrawal or until a decision is made in any Neutral Body cases pending against such member on the effective date of termination or withdrawal or in any case filed within said subsequent three-month period.

Article 25. NEUTRAL BODY

(a) Appointment and Qualifications of the Neutral Body:

(1) The Conference shall appoint, upon terms to be fixed by separate contract, an impartial, independent person, firm or organization to be designated the Neutral Body which shall be authorized to receive written complaints reporting possible breaches of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice, and to investigate and decide upon such alleged breaches and, if such breaches

are found, to assess damages, and in addition, to collect damages assessed, after payment thereof becomes delinquent.

(2) Appointment of the Neutral Body hereafter will be by vote of the Conference membership under Article 19 of the Conference Agreement. The appointment will be made from amongst candidates which are qualified and willing to serve.

Prior to such appointment, a candidate will be required to divulge to the Conference any material "professional or business relationships, financial interests or service contracts" (hereafter in this Article simply "interests") which it may have with any of the members, their "employees, agents, sub-agents or their subsidiaries or affiliates" (hereafter in this Article simply "agents"). The candidate will also be required to agree, in the event of appointment, to divulge any future proposals it might receive to create such interest, and promise to obtain Conference approval thereof before accepting any such proposal. Such interest so divulged, if any, will not affect the qualification of the Neutral Body when appointed by the Conference with knowledge thereof, and the members will not raise an objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint against a member with which it may have such an interest. After disqualifying itself the Neutral Body is authorized to appoint an agent without such interest in the respondent to conduct the particular investigation and handle the complaint on behalf of the Neutral Body and such appointee shall have all of the authority and duties of the Neutral Body for that particular matter up through the date when the appointee reports its decision to the Ethics Committee under this Article 25 (f) (4).

(3) The Neutral Body will have the authority and responsibility to engage agents, lawyers and/or experts, including shipping experts,

who can assist with its investigation and consideration of complaints and to pay on behalf of the Conference all costs incidental thereto. Such agents or experts appointed by the Neutral Body must not have any interest in the particular member named in the particular complaint.

(b) Jurisdiction of the Neutral Body:

(1) The Neutral Body shall have jurisdiction to handle, in accordance with the procedures of this Article all written complaints submitted to the Neutral Body by the Conference Chairman or a member alleging breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or, on its own motion, any breaches of this Article 25; provided, that nothing herein contained shall change the functions of the Misrating Committee.

(2) "Malpractice" as used in this Article shall mean any direct or indirect favor, benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer, or other cargo interests or any of their agents, or any other act or practice resulting in unfair competitive advantage over other members.

(c) Member Lines' Responsibility to Report Breaches and Assist Investigations:

(1) The members and/or the Conference Chairman shall report promptly to the Neutral Body in a written complaint any and all information of whatsoever kind or nature coming to their knowledge which, in their opinion, indicates a breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or any breach of this Article 25 by a member or its agents, and failure to report such information by any member will be a breach of this Article.

(d) Investigation:

(1) The Neutral Body and/or its agents, shall have the power, authority and responsibility to investigate written complaints and in

investigating said complaints to call upon a member or its agents at any of their offices during office hours and inspect, copy and/or obtain "correspondence, records, documents, signed written statements or oral information and/or other materials" (hereinafter in this Article "materials"), which materials are deemed by the Neutral Body in its sole discretion to be relevant to the complaint. Upon making such a call the Neutral Body shall have the right to see and copy such materials immediately and without prior screening by the member or its agents.

(2) Correspondingly each of the members shall have the duty and responsibility to supply such materials, and to cooperate in interviews promptly upon demand made in person by the Neutral Body or its agents and without prior screening, whether said materials or personnel are located in the member's own offices or in its agents' offices. Failure of a member or its agents to supply the materials required by the Neutral Body or its agents promptly will constitute a breach of this Agreement by the member, and the member undertakes to thoroughly inform its agents of the member's liability for their conduct and obtain their commitment to comply with the Conference Agreement, Tariff Rates or Rules and Regulations. In addition the members undertake an affirmative duty to cooperate and assist the Neutral Body in obtaining other required information whenever possible.

(3) The records of the Conference will be made available to the Neutral Body on request and the Conference Chairman and staff will render all assistance possible to the Neutral Body during investigations.

(e) Confidential Information:

(1) The Neutral Body will under no circumstances disclose the name of the complainant to the respondent or anyone else, including the Neutral Body's agents, unless specifically authorized to do so by the complainant.

(2) The Neutral Body will treat all information received during investigations regardless of the sources, as confidential and will not divulge any such information to anyone, except in reporting breaches found and damages assessed to the Ethics Committee, and then only to the extent that the Neutral Body itself deems appropriate.

(f) Hearing for the Respondent; Neutral Body Decisions and Announcement Thereof:

(1) On concluding its investigation, the Neutral Body will consider the information obtained and decide in its absolute discretion whether the facts have been sufficiently established to constitute a breach of the Agreement, Tariff Rates or Rules and Regulations, and if a breach is found which was not covered by the complaint, such breach may also be reported and damages may be assessed thereon against any member liable.

(2) In deciding whether a breach exists based on the results of its investigation, the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead it will employ rules of common sense in determining breaches and assessing damages and the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach probably occurred.

(3) After the Neutral Body has completed its investigation and arrived at its tentative decision that there was a breach (but before announcing the breach to the Ethics Committee, and even before the amount of damages is decided), the Neutral Body will inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose. Within fifteen (15) days, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or counsel, and offer to the Neutral Body such explanations as it may choose at such meeting.

(4) The Neutral Body will then make its final decision and either discharge the respondent or assess liquidated damages against him. In assessing said damages, the members recognize that breaches of the Conference Agreement, Tariff Rates or Rules and Regulations cause substantial damages, not only in lost freight but in consequent instability of the Conference rate structure. The members further recognize that the damages

caused are cumulative with the number of breaches, but the members further recognize that it is difficult to assess such damages precisely. Therefore the Neutral Body is authorized to assess liquidated damages in accordance with the following schedule:

- a) First breach: maximum of Ten Thousand Dollars (\$10,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- b) Second breach: Maximum of Fifteen Thousand Dollars (\$15,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- c) Third breach: maximum of Twenty Thousand Dollars (\$20,000) U.S.A. Currency or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- d) Fourth breach and subsequent breaches: maximum of Thirty Thousand Dollars (\$30,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

After its decision the Neutral Body will then report to the Ethics Committee the decision and the amount of the damages assessed, if any. In addition the Neutral Body may report evidence or information discovered during its investigation, but the extent of such further reporting, if any, shall be subject to the absolute discretion of the Neutral Body, and in no event will the Neutral Body report the name of the complainant without consent, or report confidential information.

(5) The Ethics Committee will notify the members through the Chairman, of the decision and damages, if any, and will also at the same

time instruct the Chairman to notify the respondent of the decision, but only if a breach is found, and in such case the respondent will be furnished with the Neutral Body report and a Conference debit note covering the liquidated damages assessed.

(g) Unquestioned Recognition of Decisions of the Neutral Body:

(1) The members agree to accept the decisions of the Neutral Body as valid, conclusive and unimpeachable, but it is understood between the members that decisions of the Neutral Body are not admissions or proof of guilt or liability under law.

(2) The members further agree that neither jointly or severally will they bring any action whatsoever against the Neutral Body or its agents for damages allegedly arising out of its acts, omissions and/or decisions as the Neutral Body. In addition each member agrees to hold the other members of the Conference and the Neutral Body and its agents harmless from any claims which may be brought by its agents or employees against another member, the Conference or the Neutral Body or its agents for damages allegedly arising out of the Neutral Body's acts or functions.

(h) Payment of Damages:

(1) The members will pay all damages duly assessed by the Neutral Body upon receipt of a debit note from the Chairman, and if not paid within thirty (30) days of receipt of the debit note, the damages will become delinquent under Article 28 of the Conference Agreement.

(2) The Neutral Body will have the power and responsibility immediately, without notice to or further authority from the Conference, to collect as agent for the Conference and by any measures recommended by legal counsel, any damages duly assessed, as soon as they become delinquent, from the deposit or substitute security submitted and maintained by the members under Article 12 of this Agreement. The Neutral Body will pay over to the Conference immediately all damages collected.

Third: Except to the extent that the Conference Agreement is hereby amended and modified, the same shall continue in full force and effect.

Fourth: The amendments set forth hereinabove shall become effective as soon as, but not until, the same shall have been approved by the Federal Maritime Commission under the provisions of Section 15 of the Shipping Act of 1916 as emended.

IN WITNESS WHEREOF the Trans-Pacific Freight Conference of Japan, the members of which are all hereinafter listed, as authorized the foregoing amendments by resolution passed at its Regular Conference Meeting held 24 January 1962 in Tokyo, Japan.

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN

AMERICAN MAIL LINE, LTD.

AMERICAN PRESIDENT LINES, LTD.

BARBER-WILHELMSSEN

Wilhelmsens Dampskibsaktieselskab
 A/S Den Norske Afrika-og Australielinie
 A/S Tonsberg
 A/S Tankfart I
 A/S Tankfart IV
 A/S Tankfart V
 A/S Tankfart VI
 Skibsaktieselskabet Varild
 Aksjeselskapet Marina
 Aktieselskabet Glittre
 Dampskibsinteressentskabet Garonne
 Aktieselskabet Standard
 Fearnley & Egers Befragtningsforretning A/S
 Skibsaktieselskapet Sangstad
 Skibsaktieselskapet Solstad
 Skibsaktieselskapet Siljestad
 Dampskibsaktieselskabet International
 Skibsaktieselskapet Mandeville
 Skibsaktieselskapet Goodwill
 Universal Trading & Shipping Agency Aksjeselskap
 (as one member or party only)

DAIDO KAIUN KAISHA, LTD.

FERN-VILLE FAR EAST LINES

Fearnley & Eger and A. F. Klaveness & Co. A/S
 Skibsaktieselskabet Varild
 Aksjesekslapet Marina
 Aktieselskabet Glittre
 Dampskibsinteressentskabet Garonne
 Aktieselskabet Standard
 Fearnley & Egers Befragtningsforretning A/S
 Skibsaktieselskapet Sangstad
 Skibsaktieselskapet Solstad
 Skibsaktieselskapet Siljestad
 Dampskibsaktieselskabet International
 Skibsaktieselskapet Mandeville
 Skibsaktieselskapet Goodwill
 Universal Trading & Shipping Agency
 Aksjeselskap
 (as one member or party only)

IINO KAIUN KAISHA, LTD.

ISTHMIAN LINES, INC.

KAWASAKI KISEN KAISHA, LTD.

KNUTSEN LINE

Dampskibsaktieselskapet Jeanette Skinner
 Skibsaktieselskapet Pacific
 Skibsaktieselskapet Marie Bakke
 Dampskibsaktieselskapet Golden Gate
 Dampskibsaktieselskapet Lisbeth
 Skibsaktieselskapet Ogeka
 Hvalfangstaktieselskapet Suderoy
 (as one party only)

MARITIME COMPANY OF THE PHILIPPINES

MTSUBISHI SHIPPING CO., LTD.

MTSUI STEAMSHIP CO., LTD.
 (MTSUI LINE)

A. P. MOLLER-MAERSK LINE

Dampskibsselskabet af 1912 Aktieselskab
 Aktieselskabet Dampskibsselskabet Svendborg
 (as one party only)

NIPPON YUSEN KAISHA

NISSAN KISEN KAISHA, LTD.

NITTO SHOSEN CO., LTD.

OSAKA SHOSEN KAISHA, LTD.

PACIFIC FAR EAST LINE, INC.

PACIFIC ORIENT EXPRESS LINE

Skipsaktieselskapet Nordheim

Skipsaktieselskapet Vito

Skipsaktieselskapet Kirkoy

Skipsaktieselskapet Skagerak

(as one party only)

SHINNIHON STEAMSHIP CO., LTD.

STATES MARINE LINES, INC.

Global Bulk Transport Corporation

(as one member only)

STATES STEAMSHIP COMPANY

UNITED PHILIPPINE LINES, INC.

UNITED STATES LINES COMPANY

(American Pioneer Line)

WATERMAN STEAMSHIP CORPORATION

YAMASHITA STEAMSHIP CO., LTD.

By /s/ D. P. Gillette

D. P. Gillette

Chairman of the Conference

EXHIBIT 2

COPY OF
FEDERAL MARITIME COMMISSION
Agreement No. 3103-17

MEMORANDUM OF AMENDMENT approved February 14, 1962 at Regular Meeting held in the city of Tokyo, by the members signatory to the Japan-Atlantic & Gulf Freight Conference Agreement No. 3103, as amended.

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FMC DOCKET 1095
NEUTRAL BODY PROPOSAL OF STATES MARINE LINES
(AGREEMENTS 150 and 3103)

Article 10. Policing.

(a) Neutral Body. The policing of this agreement shall be carried out, in accordance with the provisions of this Article, by a private person or agency to be known as a Neutral Body.

(b) Qualifications of Neutral Body. The Neutral Body may be any person, partnership or corporation which is neutral in the sense that it has no financial, corporate, or contractual interest in, or connection with, any conference member.

(c) Selection of Neutral Body. The Neutral Body shall be chosen by vote of at least two thirds of the members entitled to vote. When selected, it shall file with the conference a certificate that is neutral within the meaning of paragraph (b) of this Article, and shall immediately amend the certificate whenever any event occurs which affects its neutrality. If the neutral body becomes non-neutral, its authority to serve as Neutral Body shall terminate, its proceedings shall be invalid, and another Neutral Body shall be selected.

(d) Terms of Employment of Neutral Body. The Neutral Body shall be employed under a written contract to be disclosed to the members and approved by vote of at least two thirds of the lines entitled to vote. The contract shall specify (among other matters) the terms of compensation of the Neutral Body and shall provide for payment of its fees and expenses out of the conference treasury upon submission of a bill itemized in reasonable detail. It shall also define, consistently with this Article, the authority and procedures of the Neutral Body.

(e) Authority of Neutral Body. The Neutral Body shall be authorized:

(1) To receive from any person complaints charging any breach by a member line of any provision of this agreement; provided, however, that a complaint shall not be entertained unless it sets forth facts in sufficient detail to apprise the accused line of the specific violation charged against it.

(2) To investigate complaints under the procedures authorized in this Article.

(3) To employ agents and attorneys reasonably needed in the course of any investigation. Such agents and attorneys must at all times be neutral (and certify their neutrality to the Neutral Body) to the same extent as the Neutral Body itself. Non-neutrality of any agent or attorney shall have the same consequence, as to the investigation in which he acts, as non-neutrality of the Neutral Body itself.

(4) To examine all records reasonably relevant to any investigation and to demand that such records be made available for examination by any member line; provided, however, that as to any accounts or financial records located in the United States, of a member line under investigation (or records of agents of such line), the member line may request that the examination be made, under the Neutral Body's direction, by auditors selected by such member line. (The auditors so designated may be the member line's regular outside auditors). Such auditors shall be approved by the Neutral Body (which shall not withhold approval unreasonably) and shall report their findings to the Neutral Body in such manner as the Neutral Body may require. A request for the use of outside auditors designated by the line under investigation shall be

filed with the Neutral Body within 10 days after the Neutral Body's demand for investigation of financial records or accounts to which this paragraph applies.

(5) To hold hearings.

(6) To report to the conference, through its Ethics Committee, the action taken on any complaint, and the result of any investigation.

(7) To impose fines up to the following maximum amounts:

First offense	-	\$10,000
Second offense	-	15,000
Third offense	-	20,000
Fourth and subsequent offenses	-	30,000

(f) Procedural requirements and Limitations. When a complaint is filed with it, the Neutral Body shall:

(1) Promptly furnish a copy of the complaint, if written, or a written summary, if oral, to the accused line, identifying the complainant and the specific transactions to which the complaint relates.

(2) Afford the accused line an opportunity to reply within 30 days after service of the complaint.

(3) Conduct such preliminary investigation as it deems appropriate.

(4) After preliminary investigation (including consideration of the accused line's reply), dismiss the complaint, or set it for hearing, with written notice in either event to the conference and the accused line.

(5) If a hearing is held, it shall be at a time and place reasonably convenient to the parties, and not sooner than 30 days after notice to the accused line.

(6) The order of proof shall be as follows:

- (i) Evidence against the accused line.
- (ii) Evidence on behalf of the accused line.
- (iii) Rebuttal.

The Neutral Body and the accused line may be represented by attorneys or other persons of their own selection. A transcript of the evidence shall be taken, which any party shall be free to inspect, and to purchase at reasonable rates; and all exhibits shall be filed and made available to the parties. Witnesses shall be subject to cross-examination. Legal rules of evidence need not be followed but proof must be credible and reasonably related to and probative of the charge under investigation.

(g) Post-hearing Procedure. After a hearing, the Neutral Body shall submit to the Ethics Committee and serve on the accused line a report signed by the person who conducted the hearing --

- (1) Summarizing the complaint and the evidence.
- (2) Setting forth findings of fact.
- (3) Specifying which charges in the complaint have been proved and which not proved.
- (4) Specifying the fine, if any, imposed for each violation found.

(h) Payment of Fines. If a fine is imposed, the accused line shall pay it to the conference within 30 days after service of the Neutral Body's report unless within that time the line demands review by arbitrators. Unless such review is demanded, the action of the Neutral Body will be conclusive.

(i) Arbitration. If a line fined by the Neutral Body demands that the fine be reviewed by arbitrators in accordance with paragraph (h), it shall name its chosen arbitrator in the demand. The Neutral Body shall name an arbitrator within 10 days thereafter (with prompt written notice to the accused line). The two arbitrators shall, within 10 days after ap-

pointment of the second, select a third, giving prompt written notice to the accused line and the conference. The three arbitrators shall meet in the city where the conference office is located, or elsewhere as the arbitrators may agree with the consent of the conference and the accused line, and shall review the fine on the record before the Neutral Body plus such additional evidence as they deem pertinent, and shall permit the accused line and the Neutral Body to argue the case. The arbitrators, by majority vote, may affirm, set aside or modify any finding or conclusion they deem erroneous, and may cancel, reduce, or increase any fine they deem improper. The decision shall be in writing; shall set forth the arbitrators' findings of fact and conclusions; shall be served on the accused line, the Neutral Body and the Ethics Committee; and shall be conclusive. The fees and necessary expenses of the arbitrators shall be paid by the conference.

(j) Payment of Fines After Arbitration. Any fine imposed by arbitrators shall be paid to the conference within 30 days after their decision in writing has been served as required above. In default of payment of a fine by the due date, the conference may resort to security posted by the line under Article 12.

(k) Cooperation with Neutral Body. All member lines, including those under investigation, shall assist the Neutral Body by all reasonable means in the performance of its duties. The refusal of a member line (whether or not under investigation) to make available any evidence under its control and reasonably relevant to a matter under investigation, when demanded by the Neutral Body, shall constitute a violation of this Article and shall be punishable as a first offense.

(l) Time Limit on Investigations. The Neutral Body shall have no authority to investigate any offense which occurred more than two years before the filing of a complaint.

(m) Criteria for Fines. The Neutral Body, and arbitrators reviewing its decisions, shall impose (or decline to impose) fines with due regard to the nature and gravity of the violation involved, taking account particularly of the following considerations:

(1) Whether the violation was innocently or purposefully committed.

(2) The number of previous violations of the same or related type by the accused line.

(3) The financial importance of the violation to the accused line and to its shipper, consignee, competitor, or other affected interest.

(4) Whether the violation substantially offended the spirit of the conference agreement or was merely technical.

(5) Whether the violation of the conference agreement also constituted a violation of law.

(6) The fines or penalties customarily imposed by courts for offenses of comparable type and importance.

(7) Whether a fine or penalty has been imposed on or paid by the accused line for the same violation in a criminal or civil proceeding.

EXHIBIT 6

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
TokyoCONFIDENTIAL
MEMO CIRCULAR NO. TPF-243/64
August 20, 1964TO ALL MEMBERS:CONFERENCE AGREEMENT NO. 150, AS AMENDED -
AMENDMENT NO. 150-21, ARTICLES 10, 12, & 25
FMC DOCKET NO. 1095

Reference: Confidential Memo Circular No. TPF-236/64

For Members' information, recorded herein is the text of a communication from Arthur Young & Company, as Neutral Body, submitting their views in respect to the Hearing Counsel's comments.

August 13, 1964

This will confirm our telephone conversation today in which we informed you that we would not be interested in serving as Neutral Body for your Conference in the event that the Neutral Body system is changed to include the procedures outlined in the Hearing Counsel's opinion of August 3 re Docket No. 1095.

Specifically, our objections to these changes are as follows:

1. Necessity of disclosing to the respondents all data deemed necessary to prove a breach.

We consider it highly essential to the operation of an effective Neutral Body system, that the Neutral Body be in a position to receive confidential information. In fact, some information may be received purely by accident and we would never put ourselves in the position of having to disclose the sources of information which, if revealed, might damage the position of an individual. We would take this position even though we had warned such individuals that information given us could not be treated as confidential. We strongly believe that if we did have to give such a warning, we would not get much of the information that we do receive in the course of our work. Frequently, the necessity to reveal the evidence may point to the source from which the evidence was received.

2. Neutral Body neutrality.

As independent certified public accountants, we take pride in the fact that we are independent. The time to establish the neutrality of the Neutral Body is before the appointment thereof.

Page 2 - CONFIDENTIAL
MEMO CIRCULAR NO. TPF-243/64

We would not object to filing an annual or semi-annual certificate as to our neutrality, at which time questions of any member line as to our neutrality could be answered. We believe that the neutrality of the Neutral Body should not be made subject to challenge by an accused line at will.

3. Arbitration.

In order to have arbitration made properly, the complete evidence on which the Neutral Body's decision is made would have to be revealed to the arbitrators. Therefore, the same objections as to No. 1 above apply to this.

Since these amendments would change the concept of the Neutral Body from that which we understood at the time of our appointment, in the event of their adoption, we would not wish to continue as Neutral Body. We believe that we should act as Neutral Body only if we can act as effectively as is possible under the circumstances. If the changes proposed by the Hearing Counsel are adopted by the Conference, we do not believe we could act effectively.

D. P. Gillette, Chairman

EXHIBIT 7

FEDERAL MARITIME COMMISSION
DOCKET NO. 1095Response of
TRANS-PACIFIC FREIGHT CONFERENCE OF JAPANStatement of purposes:

The aims of the Conference in its Neutral Body system, in the amendments to its Basic Agreement adopted and submitted to the commission for approval and in its participation in the present Docket 1095, are as follows:

- (1) To achieve a self-policing system in Neutral Body form.
- (2) To so set up the system that it will be effective in causing the members to abide by the Basic Agreement and Tariff.
- (3) To ensure fairness as well as effectiveness.
- (4) To give all due consideration to any individual Member's views and proposals for improving the system.
- (5) To obtain the affirmative approval and support of the Federal Maritime Commission for the Conference self-policing system.

Preliminary remarks:

The Conference has pioneered in the formation and carrying out of the Neutral Body concept in the steamship industry. Speaking generally, its pioneer accomplishment has been a highly successful achievement in self-policing; but this has not been achieved without difficulty and there are still problems, the solution of which has already once been approved by the Commission in this Docket and is now pending upon reconsideration. Earlier, a serious problem arose and was the subject of Docket 920 and related proceedings, concerning a provision of the Basic Agreement in regard to the qualification of the firm then acting as Neutral Body. Further, the need for continuing improvement of the self-policing system has led to the adoption of certain amendments which have been submitted to the Commission for Section 15 approval. In the present Docket, the problem now is not what interpretation to place on an agreed clause, but whether the agreed system itself is valid under the law of the Shipping Act. We hope for a definitive answer and that the Commission will affirmatively approve and support

our provisions. These are provisions that the Membership of the Conference has found necessary for effective self-policing.

The Conference desires to maintain the substance of the agreements approved by the Commission on October 30, 1963 and now pending before the Commission for reconsideration. These agreements were adopted after prolonged deliberation, based on years of consideration and experience with the practical necessities of self-policing. In its present statement, the Conference hopes to set forth more fully the reasons for the system it desires to maintain and in particular the reasons for the points of difference between this system and the system proposed by the dissenting Member.

The views presented by Hearing Counsel:

We are in general accord with the FMC staff comments, except for certain practical necessities that have been found in our self-policing experience. We will refer hereunder in more detail to these certain limited differences, which arise only from the practical needs of an effective Neutral Body system:

Impartiality of the Neutral Body firm:

We are in agreement with the FMC staff comments regarding the neutrality, or rather impartiality, of the Neutral Body, namely that an interest divulged by the Neutral Body in an accused should be disqualifying. This is in accordance with Article 25, approved by the Commission on October 30, 1963 and now under reconsideration in the light of the Silver case. As Article 25 provides, the Neutral Body is to be required to disclose any interest in any Member, prior to its appointment as Neutral Body. The existence of any such interest would of course be considered by the Membership in deciding whether or not to appoint such firm as Neutral Body. After appointment any subsequent proposals to form an interest must be reported and the consent of the Conference must be obtained before the interest is formed. If the Membership consents to a disclosed interest the Neutral Body firm may accept it, although it may not act as Neutral Body against an accused in whom it has such an interest.

In its Report in Docket 1095 of October 30, 1963, the Commission ruled favorably upon the above provisions with the following comments:

"In a recent amendment to section 15, Congress expressed its concern over past failures of steamship conferences operating in our foreign commerce to live up to the terms of their agreements when it directed this Commission to disapprove any agreement upon a finding of inadequate policing of the obligations under

it./³ Congress, however, left to the individual conferences the responsibility of selecting the method best suited for their particular trade and situation. In furtherance of this intent of Congress we have adopted a broad policy respecting self-policing systems of conferences operating in our foreign commerce./⁴ While section 15 requires self-policing modifications to be approved under that section as comprising a part of the complete agreement of the parties, we are not inclined when considering approval to specify the procedures by which the parties seek to insure that each will fulfill its obligations to the others. It seems to us that the prime concern when considering whether to approve such an agreement is whether it is unjustly discriminatory as between the carriers party to it and whether it is reasonably probable that the agreement will insure adequate policing, thereby fostering the free flow of our commerce unhampered by malpractices.

"The proposed modifications now before us are designed to strengthen the self-policing systems of the respondent conferences. The essence of protestants' argument against approval of these agreements is that the power vested in the neutral body is capable of abuse. The Commission must assume, however, that once the agreement is approved the conference will live up to its obligation to apply that agreement so that it does, in fact, adequately and without discrimination police conference obligations. We are of course under a continuing duty to maintain surveillance of these and all section 15 agreements, and should respondents fail to apply the agreements approved herein effectively and without discrimination, we shall take such steps as are necessary under the circumstances.

"We have examined the proposed modifications and the protests thereto. We find nothing in the proposed modifications which warrants their disapproval under section 15. Thus we conclude that Agreements No. 150-21 and 3103-17, are not discriminatory as between the carriers party thereto nor detrimental to the commerce of the United States, contrary to the public interest, or otherwise violative of the Act, and they should be approved under section 15 of the Act.

Our Members are very well aware of the need for impartiality in the Neutral Body. After all, the Members, who adopt the system and select the Neutral Body, are the parties directly subject to Neutral Body actions. They are also aware that the powers vested in a Neutral Body

could be abused if placed in the wrong hands. We have considered that the selection of a Neutral Body of the highest standards of integrity is more to the point than the choice of one that does not render professional services to any Member.

The Conference has been fortunate to secure the services of a Neutral Body that is impartial and, furthermore, has no connection with any Member. But in setting up a Neutral Body system in the Basic Agreement, we have had in mind also the practical necessities of our situation, namely that no other such firm is available, having such professional competence and experience yet having no connection with any of the Members. In the agreement now before the Commission, the Membership has agreed that a Neutral Body might have a connection with one or more Members under certain conditions and safeguards.

A further provision with regard to impartiality of the Neutral Body has been suggested in the FMC staff comments, namely that an accused in any case may challenge the impartiality of the Neutral Body and thus obtain a transfer of the evidence against him to what would be in effect a second Neutral Body. The suggested provision is inconsistent with the principle that if the Neutral Body possesses the prescribed qualifications it should be the sole arbiter to make decisions that are final and binding, without recurrent justification of its impartiality. Secondly, but also basically, the suggested provision would create a serious problem as to effectiveness of the resultant self-policing system in view of the fundamental need for Neutral Body discretion as to disclosure of information or informants. The latter problem will be discussed in more detail below.

Disclosure of information and informants:

The Report in Docket 1095 of October 30, 1963, and in particular Commissioner Patterson's dissenting opinion therein, shows that the above-titled problem was in consideration by the Commission at that time. We wish however to set forth here more fully the reasons why our Members have agreed to be bound by these procedures and also to explain where the Conference stands on those provisions of Article 25(e) and (f) about which Commissioner Patterson expressed his concern.

If policing is to be effective, the Neutral Body must have discretion to protect, where necessary, the confidential nature of its sources of information. A major concern and purpose of a Conference policing system is to ensure that the Members in their business relations with shippers, agents and various other third parties shall abide properly by the obligations of Conference Membership. We have found that the existence of the business relationship with the accused would often inhibit such related persons from giving information to the Neutral Body.

Information under such circumstances often can be obtained only by assuring such persons that their identity as informants will not be disclosed to the Member. Unless the Neutral Body can guarantee that their identity will not be disclosed, vital information necessary for an adjudication will not be available. If its policing system is to be effective, the Conference has no choice but to grant discretion to its Neutral Body as to how far to disclose or keep confidential the identity of an informant in any given case, and also the nature of the information given when such information would identify the source.

The Members of the Conference, recognizing this necessity, have agreed to submit to self-regulation upon this basis, by Conference action in adopting the Neutral Body articles of the Conference Agreement.* While this is a necessity in order that Conference self-policing shall be effective, we are at the same time cognizant that the Neutral Body in possession of such discretion must be a firm of the highest standards of integrity and judgment. We have ensured this by the engagement of the firm of Arthur Young & Co. in this capacity.

Ordinarily, and except where the necessities of an effective investigation require non-disclosure, the accused will be informed of the nature of the evidence against him as a matter of course. In the investigative process the Neutral Body will as a routine matter confer with the accused in order to find out the facts, or his explanation of the facts, and will give him a hearing or hearings and opportunity for rebuttal, before deciding whether a violation has occurred. This is the routine consequence of the Neutral Body's effort to arrive at the full truth about the case. More detailed provisions about this have not been written into the Neutral Body articles of the Conference Agreement, only because the Membership has felt that the actual practice has been adequate and that no such detailed provisions are needed, nor are they desirable in the relatively inflexible Basic Agreement form. The Members have agreed to leave the detailed form of hearings, as well as the disclosure of informants and information, to the discretion of the Neutral Body, which is to carry out its investigations in the way most appropriate to each case.

As to whether the Neutral Body provisions mean that the Neutral Body will make up its mind that a violation has occurred before giving

* The Silver case, which concerned an action taken against a non-member of the association, is not relevant to this situation. The Neutral Body system is a system of self-regulation voluntarily assumed by the Membership by the necessary majority as provided for in the Conference articles.

the accused notice and opportunity to rebut, we state emphatically that no such pre-judgment does in fact occur. If it is thought that the language of the provision should be improved to make the fact more clear, we will be happy to cooperate.

We are in accord also with the suggestion for some time limit whereby Neutral Body investigations would be limited to current breaches. There is already a time limit existing in practice, from the fact that only recent breaches are likely to come to attention and so to be complained of to the Neutral Body. But if it is thought that something more definite would be an improvement, then we repeat, we are glad to cooperate. We are agreeable to the idea of a statute of limitations of two years back.

Arbitration provisions.

Arbitration based on the Neutral Body's information and records would necessitate the disclosure of confidential sources. For the reasons already stated, including the need to give discretion to the Neutral Body whether to disclose or keep confidential any particular source of information and the content when the content might identify the source, the Members have agreed to be bound by Neutral Body decisions without recourse to arbitration. This again is an agreement of the Membership for self-regulation, made from a position of awareness of the practical necessities of a self-policing system. We believe the fact speaks for itself, that in our Conference of diverse membership all the Members but one have found this provision to be acceptable, as a part of the necessity of effective self-policing.

Concluding remarks:

Some parts of the proposals offered by States Marine Lines on July 31 are to the same effect as the provisions already adopted by the Conference, while other parts are unworkable for practical reasons, if the system is to serve the statutory requirement of adequacy effective policing.

For other, minor questions--such as (a) whether it is desirable or not to formulate criteria for fines as a guide to the Neutral Body in the exercise of its discretion and (b) then whether such criteria requires Section 15 approval or should be filed as subordinate regulations and (c) then what particular criteria should be adopted--we have not sought to provide an answer here, where the essential question is the validity of the present Neutral Body system, including those amendments that were favorably ruled upon on October 30 of last year. We believe that the answers to such lesser questions can better be worked out in the normal forum of regular Conference meetings, then advised to the Commission by the usual procedures under Section 15 if amendments to the Basic Agreement in these respects are necessary.

We have tried to set forth our position on major points herein in some detail, stating the major reasons behind decisions, and hope to have made them clear enough to offer some basis for reconsideration by our dissident Member, as well as a basis for consideration by the Commission.

Respectfully submitted,

GRAHAM JAMES & ROLPH

By: James E. Fagan

Attorneys for Trans-Pacific
Freight Conference of Japan

Tokyo, Japan
September, 1964

CERTIFICATE OF SERVICE

* * * * *

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN

Minutes of Regular Meeting No. 185

20 February 1963

Agenda No. 4. NEUTRAL BODY - SELECTION THEREOF

It was regularly moved and unanimously CARRIED that the recommendation of the Neutral Body Committee be approved, that the Conference adopt the following resolution:

"That the Arthur Young & Company has confirmed that it does not serve any of the individual members or members' agents that, therefore, the Committee has recommended this firm for interim appointment as being qualified and responsible accountants, not a party to, nor employed by or financially interested in any party to the Agreement, and, therefore, it is Resolved:

'That the firm of Arthur Young & Company be appointed as Neutral Body upon the terms and with the powers, duties and responsibilities as provided for by Article 25 of Agreement No. 150, as amended.

That the retainer fee and other compensation for services of the Neutral Body shall be fixed upon terms similar to those agreed with the present Neutral Body, subject to approval of the Executive Committee.

That the retainer shall express the understanding that the appointment is upon an interim basis, terminable upon 90 days notice.

That the appointment shall be made effective as soon as possible, and that the powers, duties and responsibilities authorized to the Neutral Body by Article 25 shall be borne and exercised by the said firm as to any and all matters occurring within the twelve months preceding the effective date of its appointment, and thereafter.

That the appointment of Arthur Andersen & Co. as Neutral Body shall be terminated upon the effective date of the appointment of Arthur Young & Company

or effective 3 May 1963, whichever is earlier, and the accounts of that firm with the Conference settled, as soon as possible.

That the Conference Chairman be hereby authorized and instructed to effectuate the appointment in accordance with the foregoing.'";

and further, that the retainer agreement also specify that the Conference is to reimburse the Neutral Body for any attorney fees and court costs incurred in defense of any suits brought in connection with the exercise of the Neutral Body duties.

Neutral Body Retainer Agreement

WHEREAS provision for a Neutral Body is made by Article 25 of Agreement No. 150 of the Trans-Pacific Freight Conference of Japan, as amended,

AND WHEREAS it is the desire of the members of the said Conference (hereinafter referred to as Party A) to appoint the firm of Arthur Young & Company, on an interim basis, to undertake, exercise, and carry on the powers, duties and responsibilities of the said Neutral Body,

AND WHEREAS it is the desire of the said firm of Arthur Young & Company, (hereinafter referred to as Party B) to be so appointed,

NOW THEREFORE it is hereby agreed by and between the parties aforesaid as follows:

Party A hereby appoints and Party B hereby accepts appointment as the said Neutral Body, having, undertaking, exercising, carrying on, bearing and subject to the powers, duties, responsibilities, discretions, indemnities, rights and authorities of the Neutral Body, as the same are set forth by the said Article 25, as from time to time amended, reference to which is hereby made for further particulars;

PROVIDED HOWEVER, that the said Party B as Neutral Body shall not act upon complaints as to matters occurring more than one year (365 days) prior to the effective date of its said appointment; AND PROVIDED FURTHER, that Party A shall reimburse Party B for any attorney fees and

court costs incurred in defense of any suits brought in connection with the exercise of the Neutral Body duties.

Party B shall not during the effective period of this agreement engage in the rendering of its professional services as accountants to any party to the said Agreement No. 150.

Party B shall be entitled to charge for services rendered under this agreement a retaining fee of Three Thousand Dollars (US \$3,000) per annum, in U.S. dollars or equivalent, and in addition fees on a time basis at the following rates, in U.S. dollars or equivalent:

Principals - Twelve dollars (\$12) per hour;

Assistants at a maximum of - Seven dollars (\$7) per hour;

It is further understood and agreed that the above rates shall apply as to services performed in the United States on the basis that the average billing rate shall be no less than Ten Dollars (\$10) per hour.

All out of pocket expenses and fees paid to lawyers, experts and agents, to be payable by Party A.

This agreement will come into force on the fourth day of April, 1963, and will continue into force thereafter until cancellation by either party on giving 90 days written notice, after which period the contract will terminate.

/Sgd/ D. P. GILLETTE, CHAIRMAN,
for TRANS-PACIFIC FREIGHT
CONFERENCE OF JAPAN

/Sgd/ J. D. WALDROUP
PARTNER, ARTHUR YOUNG &
COMPANY

EXHIBIT 13

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
Tokyo

2 November 1961

Lowe, Bingham & Thomsons
Naka 9th Building
14, Marunouchi, 2-chome
Chiyoda-ku, Tokyo

Attention: Mr. A. R. Forsyth

Gentlemen:

As Chairman of the Trans-Pacific Freight Conference of Japan, I was instructed to forward to you the following resolution which was adopted at the joint Owners' Meeting of both the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference at Ojai, California between 9 October through 12 October 1961:

"That this Meeting is most desirous of the two Conferences having efficient and adequate Neutral Body or self-policing systems to insure that the obligations under the respective Conference Agreements and Tariffs are faithfully complied with;

Furthermore, that this Meeting reaffirms its faith in the Neutral Body system and each Member undertakes to put forward its best efforts to insure that the system works efficiently;

Also resolved that the subject be referred to the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference with the object of having those Conferences re-examine the present Neutral Body Agreements and systems with a view to revising them, where required, in order to strengthen them in all ways possible and do all possible to reconcile the views of Members so that all Members are satisfied and will give their fullest support;

And that a copy of this resolution be furnished to Lowe, Bingham and Thomsons under cover of a letter from the Chairman of the Trans-Pacific Freight Conference of Japan and the Chairman of the Japan-Atlantic and Gulf Freight Conference setting forth clearly what those Conferences expect the Neutral Body to do."

In addition I have been instructed to transmit the following to you in accordance with the resolution at the Meeting:

- "1. The formal relations between the Conference and the Neutral Body are governed by the agreement between the parties dated 20 March 1958. The Member Lines, however, desire to put on record in more explicit form their intentions in concluding that agreement.

- "2. The Member Lines believe that the only satisfactory way of determining whether and when any of them have been guilty of malpractices, i.e., a violation of the Conference Agreement or of any regulations or code of ethics which the Members may adopt pursuant to the Conference Agreement, is to appoint an entity which is not a party to the Conference Agreement, or a Conference employee, but which will be charged with the final determination with regard to each case of malpractice. In accordance with this belief, the Conference has appointed the Neutral Body with the power and authority to make such determinations. The Members recognize that they have set for the Neutral Body an exceedingly difficult task, for in many cases it must function as investigator, prosecutor, judge and jury. The Member Lines realize that this task could never be accomplished without the willing acceptance on their part of this unusual combination of duties and the anomalies it may seem to bring with it; but they desire to assure the Neutral Body of such willing acceptance on their part.
- "3. In determining whether or not there has been a case of malpractice, the lines desire that the Neutral Body shall not necessarily be bound to find absolute proof of malpractice before finding that there has been an offense. Neither is it the desire of the lines that the Neutral Body should receive only such evidence as would be admissible in a court of law. It is the intention that the Neutral Body should have the widest discretion in all these matters reaching its decisions by a preponderance of such evidence, direct or circumstantial as it deems to be trustworthy. The lines would point out that malpractice is not likely to take place openly and in the presence of disinterested witnesses. The violations are more likely to take the form of clandestine evasions. The lines therefore would prefer, if the Neutral Body has received information, not mere gossip, which it deems to be reliable and persuasive to it, that it should determine that an offense has been committed rather than that the decision should not go against one of their Member for lack of such proof as would demonstrate the commission of the offense beyond peradventure. We have it in mind that one of the purposes of the establishment of the Neutral Body and the system of progressive penalties was to encourage the Member Lines to conduct their affairs in such fashion that not only will they commit no malpractice, but also that they should avoid any conduct which might give rise to an appearance or suspicion of malpractice.
- "4. The Neutral Body has complete discretion to consult the Conference Ethics Committee; in particular on points of common shipping practice. The lines hope that the Neutral Body will not find it necessary to consult the Ethics Committee more than occasionally on matters of propriety as opposed to practice, preferring the Neutral Body to make up its own mind on what constitutes a malpractice since it might distort the otherwise fair competition between the lines for support.

- "5. To emphasize the extent of the Neutral Body's discretion the lines wish to make it clear that they have not arranged any form of appeal procedure from decisions of the Neutral Body, and have agreed not to resort to the courts, so far as they can legally divest themselves of that right.
- "6. Above all, the lines wish to make it clear that they do not want the Neutral Body to become enmeshed in legal considerations and quibble, and that the Neutral Body is intended to work on common sense, reasonable principles."

We thank you for your usual courtesies.

Very truly yours,

/s/ _____
D. P. Gillette, Chairman

EXHIBIT 17

CORRESPONDENTS FOR PRICE WATERHOUSE & CO.

LOWE, BINGHAM & THOMSONS
* * *

Naka 9th Building
14, Marunouchi 2-Chome,
Chiyoda-Ku, Tokyo

August 4, 1959

CONFIDENTIAL

The Committee of Three on Ethics,
Trans-Pacific Freight Conference of Japan,
Tokyo.

Dear Sirs,

REPORT BY INDEPENDENT BODY
CASE NO. 3

We received a complaint from a Member Line regarding alleged indications of discrimination and suspected rebating on the (1958) seasonal movement of Mandarin Oranges.

Shortly after receipt of this complaint, we made a surprise visit on January 13, 1959 to the Tokyo Office of States Marine Lines. Such records as we requested were made available for inspection. We found that the Lines Head Office had been solicited for free passages San Francisco/Japan to be granted to shippers of Mandarin Oranges but were unable to trace other irregularities.

We decided that investigations should next be carried out at the Lines Head Office in New York and early in February, 1959 we advised our correspondents there accordingly. They were for certain reasons requested not to commence their enquiries immediately.

On April 28, 1959, our correspondents were informed that they would be allowed to carry out the work on which we had instructed them. However, on the following day they were advised that States Marine would rather have their own auditors carry out this work. We informed our correspondents that we could not delegate our duties except to agents appointed by us. Otherwise we would not be able to state that we had investigated the complaint.

Thereafter efforts to obtain access to records by our appointees or a definite yes or no as to whether this would be granted were continued until July 28, 1959 when the President of States Marine Lines stated definitely that our appointees would not be permitted to make the investigation directly.

On July 17, 1959, our appointees upon our instructions had cautioned the complaine that we considered refusal of access to records an infringement of the Neutral Body Agreement warranting a fine.

As a result of the foregoing we find that

a) Evidence of intent to commit a breach of the Undertaking by Principals of March 14, 1958 was found by us besides which the complaine Lines Head Office refused our appointees access to their records at the time we considered appropriate.

b) Refusal to allow the independent body of their appointees access to records is an infringement of clause 2 of our agreement with Member Lines warranting a fine.

c) In the circumstances we assess the fine on the Member Line concerned, States Marine Lines, at the maximum amount for a first offence, \$10,000.00 (ten thousand United States dollars) or it's equivalent in Yen.

Kindly acknowledge receipt of this notification and advise regarding the method of payment of the fine so that we can request States Marine Lines to pay accordingly.

Yours faithfully,

Lowe, Bingham & Thomsons

cc: Mr. S. Kitamura, Knutsen line,
Mr. J. Gonda, Mitsui Line,
Mr. Paul E. Mead, American President Lines,
Mr. B. P. Gillette, Chairman, Trans-Pacific
Freight Conference of Japan

TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN

KINDAI BLDG., 11 3-CHOME KYOBASHI
CHUO-KU, TOKYO

February 24, 1964

Federal Maritime Commission
Washington 25, D. C.
U. S. A.

Attention: Mr. William A. Stigler, Chief
Office of Regulations

Gentlemen:

Conference Agreement No. 150, As Amended -
Conference Membership - Mergers

Nippon Yusen Kaisha, Ltd./Mitsubishi Shipping Co., Ltd.
Nitto Shosen Co., Ltd./Daido Kaiun Kaisha, Ltd.
Nissan Kisen Kaisha, Ltd.
Kawaksaki Kisen Kaisha, Ltd./Iino Kaiun Kaisha, Ltd.
Mitsui Steamship Co., Ltd./Osaka Shosen Kaisha, Ltd.
Yamashita-Shinnihon Steamship Co., Ltd./Shinnihon
Steamship Co., Ltd.

The Membership of the undersigned Conference has ~~only~~ adopted the enclosed resolution concerning various aspects of the forthcoming mergers among Japanese Member Lines, made pursuant to the provisions of the Japanese Shipping Industry Rehabilitation and Consolidation Law and related Japanese Governmental directives.

The said resolution was duly adopted by the assenting votes of a majority of more than two-thirds of the Members of the Conference, at the regular meeting of the Members duly held in Tokyo, Japan, upon February 19, 1964.

The first three paragraphs of the enclosed resolution, being based on the status of certain members resulting by operation of Japanese corporate merger law, provide for certain internal arrangements of the Conference to be made in accordance therewith, which we are advised do not require approval under Section 15 of the Shipping Act. The final or fourth paragraph of the resolution, however, pertaining to the status of Membership of Iino Kaiun Kaisha, Ltd., has been adopted subject to approval by your Commission, for the following reasons which are applicable only to Iino Kaiun Kaisha

Page 2

Iino Kaiun Kaisha, Ltd., will carry out a merger of its operations with those of Kawasaki Kisen Kaisha, Ltd., as approved and required by the Japanese Government, by the method of transferring its common carrier fleet in the trade subject to this Conference Agreement to a wholly-owned subsidiary corporation, Iino Kisen Kaisha, which latter corporation will thereupon be merged with Kawasaki Kisen Kaisha, Ltd., upon the same day.

As a part of the said transfer of its vessels and its business to its subsidiary immediately prior to merger, the said Member will also transfer its rights and obligations of Conference Membership to the said subsidiary, whereupon the same will accordingly be succeeded to by Kawasaki Kisen Kaisha, Ltd., through the operation of Japanese corporate merger law.

Because there will be such a transfer of Membership status from Iino Kaiun Kaisha, Ltd. to Iino Kisen Kaisha, Ltd., immediately preceding the merger of the latter with Kawasaki, and because our Agreement No. 150, As Amended, does not state with specificity the terms and conditions upon which a transfer of Membership status from one corporation to another may be accomplished, the Conference resolution referring to the said transfer of Membership from Iino Kaiun to Iino Kisen has been adopted subject to the Section 15 approval of the Commission. The undersigned Chairman has been instructed to make application for such approval.

Accordingly, we hereby submit the fourth or final paragraph of the enclosed resolution under Section 15 of the Shipping Act, As Amended, and hereby request approval thereof by the Federal Maritime Commission.

Please let us have in due course your acknowledgment of the receipt hereof and assignment of an F.M.C. identification number.

We thank you for your usual courtesies.

Very truly yours,

TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN

/s/ D. P. Gillette
Conference Chairman

DPG/kk

Encl.

RESOLUTION

Whereas certain Japanese Member Lines intend to merge effective April 1, 1964, each such line remaining or succeeding after such merger shall give written assurance to the Conference Chairman that it assumes the outstanding obligations to the Conference, under Agreement No. 150 and the Conference Rules, Regulations and Practices, of the Member with whom it merges.

It is further agreed that the security deposited on behalf of the Member Lines which may lose their separate corporate identity through such merger, shall be exonerated on or after April 1, 1964, upon receipt by the Conference Chairman of written assurance from the surviving or succeeding line that it assumes all the outstanding obligations of the former line toward the Conference under FMC Agreement No. 150 and the Conference Rules, Regulations and Practices.

Whereas it appears that certain Japanese Member Lines effective April 1, 1964, may undergo mergers with other companies, not presently Members of the Conference, whereby such Member Lines will lose their separate corporate identities through merger and that the rights and obligations of such lines will be succeeded to by such other companies, it is agreed that each such surviving company shall succeed to the Membership of the constituent company as of the effective date of such merger, upon depositing security with the Conference as required of a Member and giving written assurance to the Conference Chairman that it assumes the obligations of such constituent company under FMC Agreement No. 150 and the Conference Rules, Regulations and Practices.

Whereas as part of the merger between Iino Kaiun Kaisha, Ltd. and Kawasaki Kisen Kaisha, Ltd., Iino Kaiun Kaisha, Ltd. is transferring its entire business as a common carrier to its wholly-owned affiliate Iino Kisen Kaisha, Ltd., effective April 1, 1964, it is hereby resolved that upon Iino Kisen Kaisha, Ltd. giving written assurance to the Conference Chairman that it assumes the obligation of Iino Kaiun Kaisha, Ltd., Iino Kaiun Kaisha, Ltd.'s membership may be assigned and transferred to Iino Kisen Kaisha, Ltd., subject to the approval of the Federal Maritime Commission; and the Conference Chairman is instructed to file with the Commission application for such approval.

**MEMORANDUM OF AMENDMENT TO TRANS-PACIFIC FREIGHT
CONFERENCE OF JAPAN AGREEMENT NO. 150, AS AMENDED**

Memorandum of amendment approved 5 June 1963, at the Special Meeting held in the City of Tokyo, by the members signatory to the Trans-Pacific Freight Conference of Japan Agreement No. 150, as amended,

WITNESSETH:

WHEREAS the members of the Trans-Pacific Freight Conference of Japan are parties to an Agreement designated Federal Maritime Commission Agreement No. 150, as amended, and approved by the Federal Maritime Commission or its predecessors in the administration of the Shipping Act, 1916, as amended (said Agreement as so amended and approved hereinafter referred to as the "Conference Agreement"); and

WHEREAS an amendment of Article 6 of the Conference Agreement was heretofore duly approved by the Conference and duly submitted for approval to the Federal Maritime Commission upon 24 January 1962 in a Memorandum of Amendment of Articles 6, 10, 12 and 25 of the Conference Agreement and is now pending for approval

before the Federal Maritime Commission; and

WHEREAS the members now desire to rescind and withdraw the said amendment of Article 6 now pending before the Federal Maritime Commission and to adopt in its stead an Amendment of Article 6 as hereinafter set forth,

NOW THEREFORE THE CONFERENCE AGREEMENT IS HEREBY AMENDED AS FOLLOWS:

First: Article 6 of the Conference Agreement is hereby stricken from the Conference Agreement.

Second: The previous amendment of Article 6 of the Conference Agreement heretofore approved by the Conference and submitted to and now pending before the Federal Maritime Commission as aforesaid is hereby rescinded and withdrawn.

Third: Article 6 as hereinafter set forth shall be added to the Conference Agreement and substituted for the Article 6 deleted, as follows:

ARTICLE 6. AGENTS AND SUB-AGENTS

(a) The payment of rebates, commissions or brokerage of any nature to any person, partnership, corporation, association or organization, in a direct or indirect manner, is prohibited; provided, that nothing herein contained will prohibit the payment of customary total fees up to 5% to duly appointed members' shipping agents or sub-agents engaged in soliciting, booking, receipt and/or documentation of cargo. When booking and loading is undertaken by different agents and/or sub-agents the 5% may be split between said agents and/or sub-agents concerned; provided they are the officially appointed agents or sub-agents of the carrying member at the ports concerned. A reasonable override commission (not exceeding 2 1/2%) may also be paid to the general agent where the usual commission (not exceeding 5%) is paid to sub-agents for booking and loading at ports where the general agent has no office.

(b) Members agree that, if they have their own office or branch office thereof, or if they have their own office and branch office thereof, in any conference port of call in Japan, Okinawa and Korea, they will have no agents at said port; provided, however, in case a member's own office or branch office thereof, or a member's own office and branch thereof, at said port does not engage in the business of solicitation, booking or documentation of cargo, the member may have one agent at said port for said purpose. The members also agree that, if they operate through a shipping agent and branch

offices thereof, or if they operate through a shipping agent or branch offices thereof, in any conference port of call in Japan, Okinawa and Korea, they will have only one such agent and branches thereof, or one such agent or branches thereof, at said port.

The members may have their own branch offices at places other than the conference ports of call, and shipping agents of members (not using their own offices for the business of solicitation, booking or documentation of cargo) may also have branches at places other than the conference ports of call, but no separate agents may be maintained other than the regular shipping agents and sub-agents appointed for the conference ports of call, and if said shipping agents maintain branches at points other than the conference ports of call, said branch offices will not receive a separate commission, and will not solicit or book shipments except for loading or discharge at ports covered by their appointment by a member. All shipping agents and sub-agents at conference port of call must have licensed and established ship-handling departments.

Fourth: Except to the extent that the Conference Agreement is hereby amended and modified as hereinabove set forth, the same shall continue in full force and effect.

Fifth: The amendment hereinabove set forth shall become effective immediately upon its approval by the Federal Maritime Commission under the provisions of Section 15 of the Shipping Act, 1916, as amended.

IN WITNESS WHEREOF the Trans-Pacific Freight Conference of Japan, the members of which are all hereinafter listed, has authorized the foregoing amendment by resolution passed at its Special Conference Meeting held 5 June 1963 in Tokyo, Japan.

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN

American Mail Line, Ltd.

American President Lines, Ltd.

Barber-Wilhelmsen Line

Wilhelmsens Dampskibsaktieselskab

A/S Den Norske Afrika-og Australielinie

A/S Tonsberg

A/S Tankfart I

A/S Tankfart IV
 A/S Tankfart V
 A/S Tankfart VI
 Skibsaktieselskabet Varild
 Aksjeselskapet Marina
 Aktieselskabet Glittre
 Dampskibsinteressentskabet Garoone
 Aktieselskabet Standard
 Fearnley & Egers Befragtningsforretning A/S
 Skibsaktieselskabet Sangstad
 Skibsaktieselskabet Solstad
 Skibsaktieselskabet Siljestad
 Dampskibsaktieselskabet International
 Skibsaktieselskabet Mandeville
 Skibsaktieselskabet Goodwill
 Universal Trading & Shipping Agency
 Aksjeselskap
 (as one member or party only)

Daido Kaiun Kaisha, Ltd.

Fern-Ville Lines

Fearnley & Eger and A. F. Klaveness & Co. A/S
 Skibsaktieselskabet Varild
 Aksjeselskapet Marina
 Aktieselskabet Glittre
 Dampskibsinteressentskabet Garonne
 Aktieselskabet Standard
 Fearnley & Egers Befragtningsforretning A/S
 Skibsaktieselskabet Sangstad
 Skibsaktieselskabet Solstad
 Skibsaktieselskabet Siljestad
 Dampskibsaktieselskabet International
 Skibsaktieselskabet Mandeville
 Skibsaktieselskabet Goodwill
 Universal Trading & Shipping Agency
 Aksjeselskap
 (as one member or party only)

Iino Kaiun Kaisha, Ltd.

Kawasaki Kisen Kaisha, Ltd.

Knutsen Line

Dampskibsaktieselskabet Jeanette Skinner
 Skibsaktieselskabet Pacific
 Skibsaktieselskabet Marie Bakke
 Dampskibsaktieselskabet Golden Gate
 Dampskibsaktieselskabet Lisbeth
 Skibsaktieselskabet Ogeka
 Hvalfangstaktieselskabet Suderöy
 (as one party only)

Maritime Company of the Philippines

Mitsubishi Shipping Co., Ltd.

Mitsui Steamship Co., Ltd.
(Mitsui Line)

A. P. Moller-Maersk Line
Dampskibsselskabet af 1912 Aktieselskab
Aktieselskabet Dampskibsselskabet Svendborg
(as one party only)

National Development Company

Nippon Yusen Kaisha

Nissan Kisen Kaisha, Ltd.

Nitto Shosen Co., Ltd.

Osaka Shosen Kaisha, Ltd.

P. & O. — Orient Lines
Peninsular & Oriental Steam Navigation Co.
Orient Steam Navigation Co., Ltd.
(as one party only)

Pacific Far East Line, Inc.

Shinnihon Steamship Co., Ltd.

States Marine Lines
States Marine Lines, Inc.
Global Bulk Transport Incorporated
(as one member only)

States Steamship Company

United Philippines Lines, Inc.

United States Lines Company
(American Pioneer Line)

Waterman Steamship Corporation

Yamashita Steamship Co., Ltd.

7 June 1963

/s/ D. P. Gillette

Chairman

TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN

FEDERAL MARITIME COMMISSION
Agreement No. 150-26
Filed 6/11/63
Approved

COPY OF

FEDERAL MARITIME COMMISSION
AGREEMENT NO. 150
APPROVED: APRIL 22, 1931
AS AMENDED TO NOVEMBER 6, 1962

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AGREEMENTConference Membership as of May 9, 1963

American Mail Line, Ltd.
American President Lines, Ltd.
Barber-Wilhelmsen Line - Joint Service
Daido Kaiun Kaisha, Ltd.
Fern-Ville Lines - Fearnley & Eger and A. F. Klaveness & Co.
A/S - Joint Service
Iino Kaiun Kaisha, Ltd.
Isthmian Lines, Inc.
Kawasaki Kisen Kaisha, Ltd.
Knutsen Line - Joint Service
Maritime Company of the Philippines, Inc.
Mitsubishi Shipping Co., Ltd.
Mitsui Steamship Co., Ltd. (Mitsui Line)
A. P. Moller-Maersk Line - Joint Service
National Development Company
Nippon Yusen Kaisha
Nissan Kisen Kaisha, Ltd.
Nitto Shosen Co., Ltd.
Osaka Shosen Kaisha, Ltd.
Pacific Far East Line, Inc.
P. & O. - Orient Lines - Joint Service
Shinnihon Steamship Co., Ltd.
States Marine Lines - Joint Service
States Steamship Company
United Philippine Lines, Inc.
United States Lines Company (American Pioneer Line)
Waterman Steamship Corporation
Yamashita Steamship Co., Ltd.

D. P. Gillette, Chairman
Kindai Building, 11,
3-Chome Kyobaski Chuo-ku
Tokyo, Japan

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN

Yokohama & Kobe

May 1, 1930

WITNESSETH: That in consideration of the benefits, advantages and privileges to be severally and collectively derived from this agreement, the parties hereto, common carriers by water, hereby associate themselves in a conference to be known as the TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN to promote commerce from Japan, Korea and Okinawa to Pacific Coast ports of California, Oregon, Washington, Canada and the ports of Hawaii and Alaska.

1. PURPOSE OF AGREEMENT. This agreement covers the establishment, regulation and maintenance of agreed rates and charges, for or in connection with the transportation of all cargo in vessels owned, controlled, chartered and/or operated by the parties hereto in the trade covered by this agreement including cargo transhipped at ports within the scope of this agreement and including as required by the trade the establishment, and maintenance of proportions or divisions of through rates on through shipments originating at points beyond the scope of this agreement, transhipped at a port within the scope of this agreement, destined to a port within the scope of this agreement and moving under through bills of lading.

2. FREIGHT CHARGES. All freight and other charges for or in connection with such transportation shall be charged and collected by the parties hereto strictly in accordance with rates, charges, classifications, rules and/or regulations adopted by the parties and recorded in the tariff or tariffs of the conference and no part thereof shall be directly or indirectly refunded in any manner to the shipper, consignee, his agent, employee or representative, or any person whatsoever connected with him. All rates, charges, rules and/or regulations, and additions thereto and changes therein, adopted pursuant to the provisions of this agreement,

as well as a copy of minutes of all meetings and of all circulars and other conference papers recording action of the parties under this agreement, shall be furnished promptly to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

3. OPEN RATES. The parties hereto may declare rates on specified commodities to be 'open' and may thereafter declare the rates on such commodities, or any of them, to be 'closed'. In the event that the rates on any commodities shall be declared 'open' the conference shall so indicate in its tariff and shall designate the extent to which it shall have relinquished control over the booking and transportation thereof.

4. NON-CONFERENCE REPRESENTATION. No party hereto shall be represented at any port or ports covered by this agreement, by any agent engaged in the solicitation booking, receipt and/or documentation of cargoes without requiring such agent to agree that such agent will not prepresent, except as husbanding agent, or chartering broker as referred to in Article 31(e), any common, private or contract carrier in the trades within the scope of this agreement other than a carrier who is a party to this agreement; and each party hereto agrees to be fully responsible to the other parties hereto for any loss or damage sustained by such other parties by reason of any act or omission of an agent which shall constitute a violation by such agent of this agreement, or would constitute a violation hereof if such agent were himself a party to this agreement; and no party shall act as an agent in the solicitation, booking, receipt and/or documentation of cargoes for any common, contract or private carrier, other than another party to this agreement, in trades within the scope of the agreement; provided, however, that nothing in this agreement shall

operate to restrict the right of any party to act as the agent of its Government subject to the understanding that the conference shall be fully informed in advance, with respect to the nature and effect of any such arrangements and same shall be fully recorded in conference minutes; and provided further, that the furnishing of information in violation of the security regulations of its Government shall not be required of any party.

5. UNFAIR PRACTICES PROHIBITED. There shall be no undue preferences or advantages or unjust or unreasonable discrimination or unfair practices against any consignor or consignee by any of the parties hereto.

6. REBATING PROHIBITED. (a) The payment of commissions or brokerage of any nature to any party or parties whatsoever, in a direct or indirect manner, is prohibited. Nothing herein contained shall prohibit the payment of customary fees to duly appointed vessel agents. The total commission payable to Lines' Agents and Sub-Agents is 5% and this covers the booking and loading operations. When booking and loading are undertaken by different Agents and Sub-Agents, the 5% may be split between the Agents and Sub-Agents concerned. No commission is payable to any party who is not an officially appointed Agent or Sub-Agent of the carrying Line.

(b) The parties ~~hereto~~ agree that they will have only one office of their own (their own branch offices excepted) or one agent or sub-agent at any one port in Japan, Okinawa and Korea and inland agents in these territories are prohibited. A branch office is considered to constitute an office where one or more full-time salaried employees are maintained by the parties hereto. Agents or sub-agents at any port must have licensed and established ship-handling departments.

7. SPECIAL PRIVILEGES PROHIBITED. The giving or receiving of special rates or other special privileges or advantages not offered to all shippers shipping under similar conditions is prohibited. Special privilege shall include, but not be limited to, the granting of free or reduced passages, allowance or special accommodation to any place or port for any shipper, consignee or broker, or prospective shipper, consignee or broker, or for any officer, employee, agent, or representative of any shipper, consignee or broker, or prospective shipper, consignee or broker, or to any member of the family of any of the aforesaid.

No payment of unsubstantiated claims of any nature shall be made to any party or parties whatsoever either directly or indirectly.

It is agreed that the entertainment of clients will be kept within reasonable limits and no money or gift of substantial nature be paid in lieu of entertainment.

8. ABSORPTIONS. The absorption of wharfage, storage, or other charges against cargo is prohibited except as may be agreed between the parties hereto, and shown in the conference tariff.

9. SWORN MEASURES. Sworn measures recognized by the conference shall be employed at all ports within its jurisdiction where it may be found practicable for the weighing and/or measuring of all cargo received for shipment on vessels of the parties to this agreement, the cost of such service to be borne by the parties of the conference who carry the cargo thus weighed and/or measured. No cargo shall be accepted for carriage at less than its gross weight or measurement as provided in the tariff and as certified by the sworn measures.

10. BREACH OF AGREEMENT. (a) In the event of any violation of this agreement by any of the parties hereto and/or their respective agents, except as provided in Articles 25 and 30 hereof and as otherwise agreed upon for specific violation covered by Conference Resolution

passed in conformity with the provisions of the basic agreement, such party or parties shall be subject to the payment of damages for each and every violation which shall be decided and assessed to the satisfaction of all parties hereto, except the party or parties charged with the violation, but if the party and/or parties hereto committing the alleged violation of this agreement are dissatisfied with the decision come to, such party and/or parties shall have the right to appeal, in which event the question of breach of agreement and damages shall be left to the determination of three arbitrators to be nominated within 30 days from the day on which the appeal of the party and/or parties charged with the violation will be received at the conference office.

One of the arbitrators will be nominated by two-thirds of the parties hereto, except the party or parties charged with the violation, one by the party or parties charged, the third shall be appointed in agreement of the two arbitrators so nominated. The arbitrators shall make their award friendly and the decision of two or more of the arbitrators shall be final and binding on the parties hereto. There shall be no appeal against the award of the arbitrators.

Any fine assessed by the Neutral Body under this agreement shall be paid to the conference. All conference members agree that the existing Twenty-Five Thousand Dollars (\$25,000.00) U.S.A. currency faithful performance bond already posted with the conference shall also serve as a guarantee of the faithful performance of the foregoing and of prompt payment of any fine which may accrue against any party for its acts or the acts of its agents, sub-agents, subsidiary and/or associate companies under this agreement. Fines collected under this agreement shall be used towards defraying the expenses of the Neutral Body and other expenses which may be incurred in connection therewith. The maximum fines shall be:

- a) First offense Ten Thousand Dollars (\$10,000.00) U.S.A. currency or equivalent in yen at the official mean rate of exchange.

- b) Second offense Fifteen Thousand Dollars (\$15,000.00) U.S.A. currency or equivalent in yen at the official mean rate of exchange.
- c) Third offense Twenty Thousand Dollars (\$20,000.00) U.S.A. currency or equivalent in yen at the official mean rate of exchange.
- d) Fourth offense and subsequent offenses Thirty Thousand Dollars (\$30,000.00) U.S.A. currency or equivalent in yen at the official mean rate of exchange.

(b) In addition to the payment of damages, the offending party at the option of the conference shall be liable to expulsion from the conference or suspension of voting rights for such period of time as the conference may determine. Determination in the first instance as above as to a violation of this agreement and/or of any rules, regulations or tariff provisions of the conference, and whether the penalty shall be expulsion, suspension of voting rights and/or the payments of damages, and if the latter, the amount thereof, shall be made in accordance with Article 19.

(c) In no case shall the party complained against have any vote in the determination of any of the foregoing matters. The party complained against shall have the right to be heard and to offer a defense against the accusation even though such party may not be afforded the right to vote on his guilt or innocence.

(d) No expulsion shall become effective until and unless notice thereof, with a detailed statement of the reason or reasons therefor, shall have been air-mailed or cabled to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended. Notice of suspension of voting rights pursuant to this article shall be furnished promptly by air-mail or cable to the aforementioned Governmental agency.

11. WITHDRAWAL. Any party may withdraw from the conference by giving sixty (60) days written notice of intention to withdraw to the

conference; provided, however, that no withdrawal shall affect the liability of a withdrawing party to the conference arising out of any breach of the conference agreement or otherwise, or conference obligation incurred up to the date withdrawal becomes effective; and provided further that, without unanimous consent of all members, no party who has served a notice of withdrawal shall be entitled to vote on any conference matter, the decision with respect to which is to become effective after the effective date of such party's withdrawal or is to continue in force beyond such date. Notice of withdrawal of any party shall be furnished promptly by air-mail or cable to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

12. FAITHFUL PERFORMANCE. (a) As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or of any award or judgment which may be rendered against them hereunder, the parties hereto agree to deposit with the conference the sum of Twenty-five Thousand Dollars (\$25,000.00) in United States Government Bonds, or in United States currency, or security bond of like amount satisfactory to the conference, which shall be deposited or invested as may be agreed by the parties pursuant to Article 19. Any interest accruing thereon shall be for the account of the party making such deposit and shall be remitted promptly to such party if received by the conference. Each of the parties further agrees to deposit additional cash or security upon demand so as at all times to maintain cash or securities or any combination of both of a total market value equivalent in United States currency to the amount hereinabove specified. Such deposits or the proceeds thereof shall be applied to the payment of any damages imposed in accordance with Article 10 or elsewhere in this agreement, unless otherwise fully paid or previously satisfied.

(b) In the event of the termination of this agreement or the termination of membership or withdrawal of any of the parties hereto, the deposits made by the parties concerned shall be returned to them, together

with any accrued interest in the possession of the conference, but only after any indebtedness to the conference has been fully satisfied.

13. MEMBERSHIP. Any common carrier regularly operating or giving substantial and reliable evidence of intention to operate regularly in the trades covered by this agreement may become a member of this conference upon the approval by the parties hereto as provided in Article 19 and by affixing its signature to this agreement or a counterpart thereof and to Agreement No. 8600 or a counterpart thereof. No admission to membership shall be effective until air-mail or cable advice thereof has been sent to the Governmental Agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended. Every application for admission to membership shall be acted upon promptly. No carrier shall be denied admission except for just and reasonable cause, and advice of any denial of admission to membership, together with a statement of the reason or reasons therefor, shall be furnished promptly to the Governmental Agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

14. RULES AND REGULATIONS. (a) Members of the conference hereby organized shall abide, and the conference shall be governed, by the rules and regulations from time to time made by the said conference, which shall include, among other things, provisions in respect to meetings, both regular and special, payment of expenses incurred in the maintenance of the conference, and such other matters as, in the opinion of the parties are necessary or desirable to further the ends of the conference as set forth herein.

(b) No such rules or regulation or alteration thereof, which constitutes a modification, addition or supplement to this agreement, shall be made effective until it has been approved pursuant to Section 15 of the United States Shipping Act, 1916, as amended.

15. ADMISSION FEE. A fee of One Thousand Dollars (\$1,000.00) shall be assessed each applicant upon admission or readmission to the conference, no part of which shall be returned except upon dissolution of the conference, in which event all sums of money then remaining in the hands of the conference, after payment of all expenses, shall be divided among the parties as they may determine.

16. MEETINGS. Meetings of this conference shall be held in Tokyo, Japan, or elsewhere, as may be agreed upon by the parties. Regular meetings shall be held once a month. Other meetings may be called at any time by the Chairman and he shall call a meeting whenever requested to do so by any party.

17. NOTICE OF MEETINGS. Except as may be otherwise unanimously agreed by all parties entitled to vote, notice of meeting shall be furnished at least twenty four hours in advance to all parties. Notice shall specify the subjects to come before the meeting and no subject shall come before a meeting unless advance notice thereof has been given as herein required except by the unanimous consent of all parties entitled to vote.

18. QUORUM. Three-fourths of all parties entitled to vote shall constitute a quorum at all meetings, except when considering changes in this agreement when a quorum shall consist of four-fifths of all parties entitled to vote.

19. DECISIONS. (a) A quorum being present, decision under this agreement, other than changes in the agreement itself, are to be determined by a two-thirds vote of all parties present and entitled to vote. In cases of changes in this agreement, all parties agree to be bound by changes made with the consent of two-thirds of all parties entitled to vote except as may be otherwise provided herein. Decisions under this agreement to enter into any joint agreement shall be made by the unanimous vote of all parties to this agreement.

(b) The Chairman shall have authority, with respect to decisions on rate matters, to obtain the votes of the parties by telephone in lieu of meeting in conference. All members entitled to vote must be contacted and their votes obtained in each case. Decisions on matters voted on by telephone shall be made by a two-thirds vote of all parties entitled to vote except as otherwise agreed herein. The Chairman shall determine whether or not the question at issue is of sufficient importance to warrant a telephone vote. Should any one member line object to the taking of a telephone vote, the matter must be brought before the members at a Regular or Special meeting. The Chairman will not disclose the votes taken by telephone if any one of the members has so requested at the time of voting.

(c) At the request of any party, voting shall be by secret ballot which shall be counted by the secretary who shall announce whether the motion 'carried' or 'failed to carry' without disclosing the number of votes 'for' and/or 'against' the motion.

20. VOTING PRIVILIGES. Except as otherwise specifically provided for in Articles 10, (c) and 26, each party shall have one vote on all matters and shall be represented by an accredited representative at all meetings.

21. OFFICERS AND DUTIES. (a) The parties hereto may designate a General Chairman, a Chairman and/or other officers and prescribe the duties and the compensation payable thereto. The duties of said officers may be exercised by one and the same person. A minute record shall be kept of the proceedings of all meetings.

If a General Chairman is designated, he shall have the power to perform all duties of the Chairman during his term of office, and shall have general powers to supervise the affairs of the conference, and except as provided in Article 21 (b) hereof, wherever the term 'Chairman' is used in this agreement it shall refer to the General Chairman, if the General Chairman is in office, or in his absence to the Chairman of the conference. In performing his functions, the General Chairman shall have full authority to

either act directly or delegate his powers , duties and responsibilities herein conferred to the Chairman or other officers for performance under his supervision.

(b) Chairman - The Chairman of the conference shall preside at all regular and special meetings of the conference. Should the Chairman be unable to attend such meetings, the General Chairman shall preside. If the General Chairman is also unable to attend, the senior member in length of current service on the Executive Committee shall preside.

(c) Secretary - The Conference shall appoint a Secretary who shall carry out the duties assigned to him in this agreement and those assigned to him from time to time by the Conference Chairman. The Secretary shall be paid such remuneration as may be agreed by the members.

22. EXECUTIVE COMMITTEE. The conference shall elect the Executive Committee consisting of five (5) members and one alternate. Each member of the Executive Committee will be elected by a vote of not less than two-thirds of the members entitled to vote. Initially, the Committee shall be elected for staggered terms to provide for the replacement of one Member each 6 months; however, no Member Line to serve longer than two and one-half (2-1/2) consecutive years.

The Committee shall meet on the first Wednesday of each month and at such other times as requested by the chairman or a member. All decisions of the Executive Committee shall be adopted by a majority vote of its regular members.

A resume of the proceedings of all meetings of the Executive Committee shall be prepared and copies thereof shall be furnished to all members of the conference promptly after each meeting.

The Executive Committee shall make recommendations to the conference on all matters within the scope of this agreement when requested to do so by any member of the conference and the recommendations of the Executive Committee shall be furnished to all members of the conference by

the chairman who shall indicate whether the recommendations were adopted unanimously by the Executive Committee and, if not, shall indicate any dissenting opinion without identifying the dissenting member or members.

The Executive Committee, aided by the conference chairman shall be responsible for the routine administration of the conference office and staff, and shall be authorized to make all decisions necessary for this purpose.

It shall be the right and the duty of the conference chairman to consult with the Executive Committee before taking any action if in the opinion of the chairman such consultation is necessary or advisable or involves matters not previously acted upon and decided by the conference members.

23. RATE COMMITTEE. (a) There shall be a standing committee known as the Rate Committee, consisting of three (3) members. The Chairman of the conference shall act as Chairman of the committee (without vote) and he shall have authority to call meetings of the committee whenever necessary or desirable. The Chairman shall appoint the members of the Rate Committee whose terms of office shall be six months.

(b) It shall be the duty of the Rate Committee to consider all requests for the establishment of new rates and tariff rules or changes in rates and tariff rules and to submit their recommendations thereon in writing through the conference Chairman for consideration at regular or special meetings of the conference. All decisions of the committee shall be by a majority vote of its members.

(c) Upon approval of this Article 23 (c) pursuant to Section 15 of the Shipping Act, 1916, and until September 30, 1961, voting rights on rate matters are suspended for members who do not operate strictly transpacific services but who only serve the Pacific Coast ports as way ports of other services. Rates shall be decided by a two-thirds vote of those members who have voting rights on rate matters. Furthermore the Rate

Committee shall be selected from only those members who have voting rights in rate matters.

24. ETHICS COMMITTEE. There shall be an Ethics Committee, consisting of three (3) members. The Chairman of the conference shall act as Chairman of the Committee (without vote) and he shall have authority to call meetings of the Committee whenever necessary or desirable. The Chairman shall appoint the members of the Committee whose terms of office shall be not less than six (6) months or more than ten (10) months as specified by the Chairman.

The Ethics Committee shall have the duty of receiving reports from the Neutral Body and conveying them to the conference in accordance with the provisions of Agreement with the Neutral Body.

The Ethics Committee shall also investigate, report and otherwise handle routine matters as assigned to it by the Chairman of the conference and shall have the further duty of assisting and advising the Chairman of the conference on malpractice matters.

(a) Special Committees - In addition to the standing Committees provided for in Articles 22, 23 and 24, there may such special committees appointed by the Chairman as the conference may from time to time establish.

25. NEUTRAL BODY. There shall be a Neutral Body selected and appointed by the conference from responsible accountants or other person or persons, not a party to, nor employed by or financially interested in any party to the agreement upon such terms as are agreed between the conference and the Neutral Body. The Neutral Body shall have the following powers, duties and responsibilities:

1. To receive complaints in writing from members of the conference pursuant to their obligations hereunder to report malpractices.

the chairman who shall indicate whether the recommendations were adopted unanimously by the Executive Committee and, if not, shall indicate any dissenting opinion without identifying the dissenting member or members.

The Executive Committee, aided by the conference chairman shall be responsible for the routine administration of the conference office and staff, and shall be authorized to make all decisions necessary for this purpose.

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1. To receive complaints in writing from members of the conference pursuant to their obligations hereunder to report malpractices.

2. To investigate said complaints and receive evidence thereon from members of the conference or from the conference offices or otherwise.
3. To engage agents, lawyers or other experts in connection with its investigation and consideration of complaints and to pay on behalf of the conference all costs incidental to engagement and use of such agents, lawyers and other experts.
4. To have absolute discretion to decide whether or not an infringement has taken place and the conference shall have no right to question such decision, subject to the maximum fines set forth below:

The maximum fines assessed by the Neutral Body shall be:

- a) First offense up to a maximum of U.S. \$10,000.00
 - b) Second offense up to maximum of U.S. \$15,000.00
 - c) Third offense up to a maximum of U.S. \$20,000.00
 - d) Fourth offense and subsequent offenses up to a maximum of U.S. \$30,000.00
5. To report to the extent appropriate the result of its investigation to Ethics Committee but without disclosing the names of complainants. The Ethics Committee shall notify the member lines through the conference Chairman.
 6. To give directions as to payment of fines after assessment and notification to the Ethics Committee.
 7. The undersigned lines promise to report immediately to the Neutral Body directly any apparent or alleged deviation from the conference agreement of its rules and regulations of correct and ethical practices thereunder which come to their attention or knowledge.

All lines agree to accept the decision(s) and any assessment(s) of fines thereof by the Neutral Body as final and binding.

8. To enable complaints to be investigated, the conference shall make available to the Neutral Body all records, correspondence and documents of every kind wherever located and give all assistance and information whatsoever verbal or otherwise which may be required by the Neutral Body at their absolute discretion. All the records of the freight conference at the secretary's office will also be available to the Neutral Body.

9. The conference members jointly and severally shall indemnify the Neutral Body against any liability to third parties including employees under any libel or other action which might be brought against the Neutral Body arising from the performances of its duties under this agreement. The conference members jointly and severally shall have no right to claim against the Neutral Body or their agents in any such libel or other action.

10. The retainer fee and other compensation for services of the Neutral Body shall be as agreed between the member lines and the Neutral Body.

26. MAINTENANCE OF SERVICE. (a) Failure of any party to this agreement to have a sailing in the trades covered by this agreement for a period of ninety consecutive days shall be a suspension of service and any party whose services have been thus suspended shall have no right to vote on any matter within the scope of this agreement, except changes in this agreement, until service has been resumed.

(b) If any party whose services have been thus suspended, fails to resume service within a period of ninety consecutive days after the termination of the first ninety day period, the conference may, pursuant to Article 19, declare that such party has abandoned service in the trades covered by this agreement. The party whose services are involved shall have no vote in any decision hereunder. In the event of a declaration of abandonment, as herein provided, the party whose service is declared abandoned shall immediately be notified by the conference and thereupon the membership of such party in this conference shall be automatically terminated.

(c) Acts of war, strikes, lockouts, other labor disturbances, or force majeure which may result in a suspension of service or cause for a declaration of abandonment shall be considered by the parties as cause for waiving the penalty provided in this Article. In no event shall a party whose services have been suspended for a period of 180 consecutive days have the right to vote on any matters under this agreement, including changes in the agreement itself, unless such suspension of service is excused by the conference for reasons enumerated herein.

(d) Notice of loss or restoration of voting rights, abandonment of service and waiver of penalties shall be furnished promptly by air-mail or cable to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

(e) Resumption of service shall be deemed to have been made as of the date a vessel commences to load at its first port of call in Japan, Korea or Okinawa for a voyage to any port of discharge covered by this agreement.

27. EXPENSES OF THE CONFERENCE. The expenses of the conference shall be pro-rated among the members as they shall from time to time determine.

28. DELINQUENT MEMBERS. A member shall become delinquent upon failure to pay any indebtedness to the conference within thirty days after receipt of notice of such indebtedness.

29. CONSULAR INVOICES AND FREIGHT MANIFESTS. Before issuing Bills of Lading, members shall obtain from shippers properly authenticated copies of consular invoices or declarations covering each shipment in accordance with instructions issued from time to time by the Secretary, including any exceptions on commodities for which consular visas are required. Such invoices must bear the stamp of the United States Consulate, contain no erasures nor alterations from the original invoices. Such invoices, together with true copies of freight

manifests prepared by the members and duly certified by such members, shall be filed with the office of the Secretary not later than the 15th of the succeeding month following upon the month in which the cargo was loaded. In the case of any of these documents not being received by the conference office within that period, the Secretary to notify the Member Line or lines concerned who shall be required to furnish the documents not later than seven days thereafter. Any Member Line failing to do so shall pay Y10,000.00 for each offense and for each port involved to compensate the conference for any delays and inconvenience caused thereby; payment of such compensation shall not excuse a Member Line from the obligation of filing such documents, and until the Member Line files such documents he shall be considered in violation of the Agreement unless excused as per exemption specified below:

EXCEPTION: It is recognized that delays may occur which are beyond the control of the carrier in obtaining consular invoices covering cargo loaded and if suitable explanation is furnished by the Member Line for such delay an exemption may be made as regards the required time for filing.

Any information so filed with the office of the Secretary shall not be used in violation of Section 20 of the United States Shipping Act, 1916, as amended.

30. DIVULGENCE OF CONFERENCE PROCEEDINGS PROHIBITED.

(a) It shall be the rigid duty of each member to maintain secret and confidential the nature of all questions and matters which may come before the conference, either for consideration or decision thereon. Divulgence of such information to persons other than members of the conference shall subject any offending member to a fine, the amount of which shall be determined by the conference but which may not, for any single offense, exceed One Thousand Dollars (\$1,000.00). The offending member shall not cast any vote in the determination of the application of a fine or the amount thereof pursuant to this Article.

(b) The provision of the Article shall include, but not be limited to, the making public of any confidential conference documents.

(c) If the conference shall be unable to determine responsibility for a violation of this Article by means of a poll of the members, the matter may, upon request of any conference member, be placed in the hands of an outside confidential agency selected by the conference to trace and determine, at conference expense, the identity of the offending party or parties.

(d) All publicity concerning conference affairs, proceedings and discussions shall be disseminated only by the Secretary and under instructions from the Chairman.

31. RESPONSIBILITY FOR ACTS OF EMPLOYEES, AGENTS, SUB-AGENTS, AFFILIATES AND SUBSIDIARIES, AND ASSURANCES

(a) Members shall be responsible for the acts of their employees, agents, sub-agents, affiliates and subsidiaries engaged in the trade in maintaining both the spirit and the letter of the Conference Agreement and tariff, and Conference rules and regulations issued thereunder.

(b) Each member will take such action as may be necessary to insure the performance of the Conference Agreement, tariff and rules and regulations by its agents, sub-agents, affiliates and subsidiaries.

(c) It is agreed that the foregoing provisions of this Article 31 are not applicable to charter parties entered into between bulk cargo charterers and shipowners not parties to this agreement. Parties and their agents with chartering departments may act as brokers in such transactions and may also act as husbanding agents.

32. CONFERENCE LIABILITY. If a member shall incur legal expenses as a result of compliance with this agreement, or any rule or

regulation issued thereunder, such expenses and any damages incurred by such member arising out of legal proceedings shall be for the account of the conference and shall be pro-rated equally among the parties to this agreement; provided, however, that the conference shall determine that such expenses or damages are incurred by the member without fault upon its own part and provided, further, that such member shall report the institution of legal proceedings against it, or the threat thereof, to the conference prior to taking any action thereon individually.

33. PARTY TO OTHER AGREEMENTS. Any carrier becoming a member of this conference shall thereby become a party to, and any carrier withdrawing from conference membership shall thereby cease to be a party to, any agreements between the member lines of the conference (jointly entered into by said member lines in their capacity as conference members), and any other carrier or other person subject to the United States Shipping Act, 1916, as amended, provided said agreements are filed and approved pursuant to the provisions of said Act and contain specific provisions for such admission to or withdrawal from participation therein.

34. SECTION 15 APPROVAL. This agreement is subject to approval by the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed by their respective officers or agents thereunto duly authorized, the day and year first above written.

Filed on behalf of:

AMERICAN MAIL LINE
BARBER-WILHELMSSEN LINE
CANADIAN PACIFIC STEAMSHIP, LTD.
DOLLAR STEAMSHIP LINE
KAWASAKI KISEN KAISHA
NIPPON YUSEN KAISHA
OSAKA SHOSSEN KAISHA

By: W. H. Bower, Secretary
TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE
KINDAI BLDG., 11, 3-CHOME, KYOBASHI, CHUO-KU
TOKYO

C. A. COLE, JR.
Chairman

Cable Address
J A C O N F E R
Telephone 535-6336

Air Mail

February 24, 1964

Federal Maritime Commission
Washington 25, D. C.
U. S. A.

Att'n: Mr. William A. Stigler, Director
Bureau of Foreign Regulation

Conference Agreement No. 3103, As Amended
Membership

Dear Sirs:

The membership of the undersigned Conference has duly adopted the enclosed resolution concerning various aspects of the forthcoming mergers among Japanese member lines, made pursuant to the provisions of the Japanese Shipping Industry Rehabilitation and Consolidation Law and related Japanese Governmental directives.

The said resolution was duly adopted by the assenting votes of a majority of more than two-thirds of the members of the Conference, at the regular meeting of the members duly held in Tokyo, Japan, upon February 19, 1964.

The first three paragraphs of the enclosed resolution, being based on the status of certain members resulting by operation of Japanese corporate merger law, provide for certain internal arrangements of the Conference to be made in accordance therewith, which we are advised do not require approval under Section 15 of the Shipping Act. The final or fourth paragraph of the resolution, however, pertaining to the status of membership of Iino Kaiun Kaisha, Ltd., has been adopted subject to approval by your Commission, for the following reasons which are applicable only to Iino Kaiun Kaisha:

Iino Kaiun Kaisha, Ltd., will carry out a merger of its operations with those of Kawasaki Kisen Kaisha, Ltd., as approved and required by the Japanese Government, by the method of transferring its common carrier fleet in the trade subject to this Conference Agreement to a wholly-owned subsidiary corporation, Iino Kisen Kaisha, Ltd., which latter corporation will thereupon be merged with Kawasaki Kisen Kaisha, Ltd., upon the same day.

As a part of the said transfer of its vessels and its business to its subsidiary immediately prior to merger, the said member will also transfer its rights and obligations of Conference membership to the said subsidiary, whereupon the same will accordingly be succeeded to by Kawasaki Kisen Kaisha, Ltd., through the operation of Japanese corporate merger law.

Because there will be such a transfer of membership status from Iino Kaiun Kaisha, Ltd. to Iino Kisen Kaisha, Ltd., immediately preceding the merger of the latter with Kawasaki, and because our Agreement No. 3103 does not state with specificity the terms and conditions upon which a transfer of membership status from one corporation to another may be accomplished, the Conference resolution referring to

To: Federal Maritime Commission

February 24, 1964

- Page 2 -

the said transfer of membership from Iino Kaiun to Iino Kisen has been adopted subject to the Section 15 approval of the Commission. The undersigned Chairman has been instructed to make application for such approval.

Accordingly, we hereby submit the fourth and final paragraph of the enclosed resolution under Section 15 of the Shipping Act, as amended, and hereby request approval thereof by the Federal Maritime Commission.

Please let us have in due course your acknowledgment of the receipt hereof and assignment of an F.M.C. identification number.

We thank you for your usual courtesies.

Yours very truly,

/s/ C. A. Cole
Chairman

Neutral Body Retainer Agreement

WHEREAS provision for a Neutral Body is made by Article 25 of Agreement No. 3103 of the Japan-Atlantic and Gulf Freight Conference, as amended,

AND WHEREAS it is the desire of the members of the said Conference (hereinafter referred to as Party A) to appoint the firm of Arthur Young & Company, on an interim basis, to undertake, exercise, and carry on the powers, duties and responsibilities of the said Neutral Body,

AND WHEREAS it is the desire of the said firm of Arthur Young & Company, (hereinafter referred to as Party B) to be so appointed,

NOW THEREFORE it is hereby agreed by and between the parties aforesaid as follows:

Party A hereby appoints and Party B hereby accepts appointment as the said Neutral Body, having, undertaking, exercising, carrying on, bearing and subject to the powers, duties, responsibilities, discretions, indemnities, rights and authorities of the Neutral Body, as the same are set forth by the said Article 25, as from time to time amended, reference to which is hereby made for further particulars; PROVIDED HOWEVER, that the said Party B as Neutral Body shall not act upon complaints as to matters occurring more than one year (365 days) prior to the effective date of its said appointment; AND PROVIDED FURTHER, that Party A shall reimburse Party B for any attorney fees and court costs incurred in defense of any suits brought in connection with the exercise of the Neutral Body duties.

Party B shall not during the effective period of this agreement engage in the rendering of its professional services as accountants to any party to the said Agreement No. 3103.

Party B shall be entitled to charge for services rendered under this agreement a retaining fee of Three Thousand Dollars (US\$3,000) per

annum, in U.S. dollars or equivalent, and in addition fees on a time basis at the following rates, in U.S. dollars or equivalent:

Principals - Twelve dollars (\$12) per hour;

Assistants at a maximum of - Seven dollars (\$7) per hour;

It is further understood and agreed that the above rates shall apply as to services performed in the United States on the basis that the average billing rate shall be no less than Ten Dollars (\$10) per hour.

All out of pocket expenses and fees paid to lawyers, experts and agents, to be payable by Party A.

This agreement will come into force on the first day of May, 1963, and will continue in force thereafter until cancellation by either party on giving 90 days written notice, after which period the contract will terminate.

/s/ C. A. Cole, Jr.
C.A. COLE, JR., CHAIRMAN
for JAPAN-ATLANTIC AND
GULF FREIGHT CONFERENCE

/s/ J. D. Waldroup
J. D. WALDROUP
PARTNER, ARTHUR YOUNG
& COMPANY

BY-LAWS

American Institute of Certified Public Accountants

As Amended March 3, 1964

* * * * *

4.05 A member or associate engaged in an occupation in which he renders services of a type performed by public accountants, or renders other professional services, must observe the by-laws and Code of Professional Ethics of the Institute in the conduct of that occupation. [See below, Opinion No. 7.]

4.06 A member or associate shall not be an officer, director, stockholder, representative, or agent of any corporation engaged in the practice of public accounting in any state or territory of the United States or the District of Columbia.

ARTICLE 5: Relations with Fellow Members

5.01 A member or associate shall not encroach upon the practice of another public accountant. A member or associate may furnish service to those who request it. [See below, Opinions Nos. 1, 9 and 11.]

5.02 A member or associate who receives an engagement for services by referral from another member or associate shall not discuss or accept an extension of his services beyond the specific engagement without first consulting with the referring member or associate.

5.03 Direct or indirect offer of employment shall not be made by a member or associate to an employee of another public accountant without first informing such accountant. This rule shall not be construed so as to inhibit negotiations with anyone who of his own initiative or in response to public advertisement shall apply to a member or associate for employment.

IGO:PT

May 6, 1959

Lowe, Bingham & Thomsons
P. O. Box 797 Central
Tokyo, Japan

Dear Sirs:

TRANS-PACIFIC FREIGHT CONFERENCE
CASE NO. 3

In accordance with your letter of February 4, 1959, we have been in touch with the States Marine Corporation officials. We held a meeting with them on April 28, 1959. This meeting was attended by Mr. Frese, Executive Vice President and Treasurer, and Mr. Bardsdale, Assistant Treasurer, and two others from States Marine. We presented your letter of instruction and outlined the work we proposed to do. Mr. Frese was agreeable to our doing the work and wanted our assurance, which we gave, that we would not divulge anything we might learn about their operating results either in our report to you or to anyone else. We stated that we were not interested in the results of their operations but merely in the particular accounts and documents relating to the complaint. It was agreed that we should have available to us the relevant vessel operating statements as a means of ensuring that we would have access to the details of all vessel accounts.

Mr. Bardsdale was specifically assigned to obtain for us the necessary manifests, vouchers and other pertinent documents and to give us such assistance as we might need. It was agreed that States Marine officials should be permitted to see our working papers and report, primarily to be assured that we did not discuss therein any of their operating results. We gave further assurance of the confidential nature of the engagement. Mr. Bardsdale agreed to call us when he had obtained from the files the material necessary for us to commence the work.

On the afternoon of April 28 Mr. Bardsdale called to say that he would be ready for us the following day and would call to confirm the time. He called on April 29 and advised us that at a meeting of 'top management' it had been decided that they would rather have their own auditors (Peat, Marwick, Mitchell & Co.) carry out the examination and report their findings to us. He stated that this decision was reached because management feels that the same situation may arise in the future in the same or other Conferences, with the result that several different public accounting firms would have access to their records. He said

it is possible that Peats had already examined the voyages involved. Management was also concerned that a similar complaint and investigation could occur whenever a competing line lost cargo to States Marine. He stated that there was no reluctance at having the work done and that they were not adopting a contrary attitude, but simply felt that their own public accountants could do the job as well as we could.

We informed Mr. Bardsdale that since our instructions came from you in Tokyo and since you are the body appointed by the Conference, we would have to refer the whole matter back to you for your decision or the decision of the Conference.

We are sorry that this work was not commenced sooner but we delayed until one of our top men was available to handle the assignment. We will await your further instructions.

Yours very truly,

STATES MARINE LINES
90 Broad Street, New York, N. Y.

May 29, 1959

Mr. D. F. Houlihan
Price, Waterhouse & Company
56 Pine Street
New York 5, New York

Dear Mr. Houlihan:

RE: TRANS-PACIFIC FREIGHT CONFERENCE

I have your letter of May fifteenth with enclosures, from which I regret to note that Messrs. Lowe, Bingham & Thomsons apparently do not understand the basis for our request that our own auditors, Peat, Marwick & Mitchell, conduct the investigation in cooperation with yourselves. They have recently concluded their audit of our 1958 operations and are therefore in position to assist you without unnecessary disclosure of our affairs which have nothing to do with whatever complaint may have been made against us.

Considering the large number of Conferences of which we are a member, it is not difficult to realize the intolerable situations that would arise if we should be subjected at any time to roving examinations by Conference representatives, no matter how well intentioned, at the whim of some competitor.

As we read the Conference Agreement, the Neutral Body has full authority to "engage agents, lawyers and other experts in connection with its investigation and consideration of complaints" (Paragraph 25,) and it would seem that this does not preclude the cooperation of Peat, Marwick & Mitchell to carry out the matters which Messrs. Lowe, Bingham & Thomsons are delegating.

Very truly yours,

STATES MARINE CORPORATION

/s/ A. D. Frese

Executive Vice President

EXHIBIT 36

July 7, 1959

Mr. D. P. Gillette, Chairman
Trans-Pacific Freight Conference of Japan
Room 603 Yusen Building
Marunouchi, Chiyodaka
Tokyo, Japan

Dear Sir:

We beg to refer to correspondence exchanged between Messrs. Lowe, Bingham and Thomsons and ourselves through Messrs. Price, Waterhouse and Company of New York, concerning certain voyages we made in 1958. No doubt you are familiar with the contents of this correspondence, but we are enclosing for ready reference copy of our letter of May 29th to Messrs. Price, Waterhouse and Company.

As we stated in that letter, our auditors are Messrs. Peat, Marwick and Mitchell, a highly qualified firm of international reputation. There is no question but that Messrs. Price, Waterhouse and Company are in the same category. However, we consider that investigations of our accounting records by auditors other than Peat, Marwick and Mitchell are not only unnecessary and bothersome to our Accounting Department, but involve a matter of principle and precedent, because if the use of so-called neutral bodies is extended to other Conferences, as now under discussion in several places, it could well result in outside auditors presenting themselves at any time for investigations by the mere filing of an accusation by a disappointed competitor. The spread of this process could bring in many different auditors appointed by various neutral bodies, and thereby create an undesirable situation.

In view of this question having come up with Messrs. Lowe, Bingham and Thomsons, we requested Messrs. Peat, Marwick and Mitchell to prepare a report of the four voyages involved, and we are sending their report to Messrs. Price, Waterhouse and Company with a copy of this letter.

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STATES MARINE LINES, INC.

C. S. Walsh
President

EXHIBIT 82

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
Tokyo

CONFIDENTIAL
MEMO CIRCULAR NO. TPF-6/65
January 11, 1965

TO ALL MEMBERS:

NEUTRAL BODY AMENDMENT
CONFERENCE AGREEMENT NO. 150, AS AMENDED-
AMENDMENT NO. 150-21, ARTICLES 10, 12 & 25 -
FMC DOCKET NO. 1095

Reference: Confidential Memo Circular Nos. TPF-336/64
TPF-349/64
TPF-350/64
TPF-352/64

The Conference, at its Special Meeting held January 8, 1965, adopted the resolution as recommended by the Neutral Body Committee.

For Members' information, attached hereto is a copy of communication with a Memorandum of Amendment to Conference Agreement No. 150, as amended, dispatched to the Federal Maritime Commission on January 8, 1965.

D. P. Gillette, Chairman
per Secretary Pro Tem

Attach.

D. P. Gillette
Chairman

**TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN**

Kindai Bldg., 11, 3-Chome Kyobashi
Chuo-ku, Tokyo

Cable Address
TRACONFER
Tokyo

Tel. 535-6336

January 8, 1965

Federal Maritime Commission
Washington, D. C. 20573
U. S. A.

Attn: Mr. William A. Stigler, Director
Bureau of Foreign Regulation

Gentlemen:

**Memorandum of Amendment to the
Trans-Pacific Freight Conference of Japan
Agreement No. 150, As Amended**

We enclose herewith a Memorandum of Amendment to Trans-Pacific Freight Conference of Japan Agreement No. 150, as amended. The amendments covered in this Memorandum were approved by the Members at the Special Meeting of the Trans-Pacific Freight Conference of Japan held on January 8, 1965.

We are filing this Memorandum in compliance with Section 15 of the Shipping Act of 1916 and hereby request approval thereof by the Federal Maritime Commission.

Please note that the amendments as set forth in the enclosed Memorandum include the amendment to Article 25(f)(2) as adopted October 14, 1964 and filed under cover of our letter October 15, 1964 and the amendment to Article 10(d) as adopted December 16, 1964 as part of amendments in Agreement 150-28 and filed under cover of our letter December 16, 1964.

We thank you for your usual courtesies.

Very truly yours,

/s/ D. P. Gillette, Chairman
per Secretary Pro Tem

TS/rn

Encl.

**MEMORANDUM OF AMENDMENT
TO TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
AGREEMENT NO. 150, AS AMENDED**

MEMORANDUM OF AMENDMENT approved January 8, 1965 at the Special Meeting held in the City of Tokyo by the members signatory to the Trans-Pacific Freight Conference of Japan Agreement No. 150, as amended,

WITNESSETH:

WHEREAS the members of the Trans-Pacific Freight Conference of Japan are parties to an Agreement designated the Federal Maritime Commission Agreement No. 150, as amended, and approved by the Federal Maritime Commission and/or its predecessors in the administration of the Shipping Act of 1916 (said Agreement as so amended and approved hereinafter referred to as the "Conference Agreement"); and

WHEREAS, the Conference, although acting under no legal requirement, desires to amend further Articles 10 and 25 in amendments now pending approval of the Federal Maritime Commission in Agreement 150-21 in order to achieve optimum clarity, fairness and effectiveness.

NOW THEREFORE THE SAID ARTICLES ARE HEREBY AMENDED TO READ AS FOLLOWS (the parts to be deleted are crossed out and the parts to be added are underlined):

Article 10. BREACH OF AGREEMENT

~~(a) Except as provided in Articles 25 and 30 hereof and as otherwise agreed upon for specific breaches covered by Conference Resolution passed in conformity with the provisions of the basic agreement, in the event of any breach of this Agreement by a member and/or its agents, such member shall be subject to the payment of damages for each and every such breach. The determination of a breach and the amount of damages payable therefor shall be decided and assessed by vote of the Conference under Article 19 hereof; provided however that the member charged with breach shall not have a vote.~~

(a) In the event of any breach of the terms of this Agreement by a member and/or its agents, such member shall be subject to the payment of damages for each and every such breach. The determination of a breach and the amount of damages payable therefor shall be decided and assessed by vote of the Conference under Article 19 hereof; provided however that the member charged with a breach shall not have a vote; and provided further that breaches of the terms of Articles 25 and 30 and breaches involving malpractices as defined under Article 25 shall not be determined hereunder.

If the member committing the alleged breach of this Agreement is dissatisfied with the decision, such member shall have the right to appeal, in which event the questions of breach of the Agreement and damages shall be left to the determination of three arbitrators to be nominated within thirty (30) days from the date of receipt of said member's appeal at the Conference office.

One arbitrator shall be nominated by two-thirds of the members, excluding the member charged with breach, one by the member charged and the third shall be appointed by agreement of the two arbitrators so nominated. The arbitrators shall make their award by decision of two or more of them, and the award shall be final and binding on all members. There shall be no appeal against the award of the arbitrators. Nothing contained in this agreement shall interfere with the rights of any member line under the provisions of the Shipping Act, 1916, as amended, or the jurisdiction of the Federal Maritime Commission under said Act or any other pertinent Federal laws.

(b) In lieu of or in addition to the payment of damages, the offending member, at the option of the Conference, shall be subject to expulsion from the Conference or suspension of voting and other rights for such period of time as the Conference may determine. The determination of breach and assessment of the penalty of expulsion or suspension and, if suspension, the duration thereof, shall be in accordance with paragraph (a) above.

(c) In no case shall the member complained against have any vote in the determination of any of the foregoing matters. The member complained against shall have the right to be heard and to offer a defense against the allegations even though such member shall not be afforded the right to vote on the matter.

(d) No expulsion shall become effective until and unless notice thereof, with a detailed statement of the reason or reasons therefor, shall have been furnished the expelled member and a copy airmailed or cabled to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended. Notice of suspension of voting rights pursuant to this Article shall be furnished promptly by air mail or cable to the aforementioned Governmental agency.

Article 25. NEUTRAL BODY

(a) Appointment and Qualifications of the Neutral Body:

(1) The Conference shall appoint, upon terms to be fixed by separate contract, an impartial independent person, firm or organization to be designated the Neutral Body which shall be authorized to receive written complaints reporting possible breaches of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice, and to investigate and decide upon such alleged breaches and, if such breaches are found, to assess damages, and in addition, to collect damages assessed, after payment thereof becomes delinquent.

(2) Appointment of the Neutral Body hereafter will be by vote of the Conference membership under Article 19 of the Conference Agreement. The appointment will be made from amongst candidates which are qualified and willing to serve.

Prior to such appointment a candidate will be required to divulge to the Conference any material "professional or business relationships or financial interests" ~~or service contracts~~ (hereafter in this Article simply "interests") which it may have with any of the members, their "employees, agents, sub-agents or their subsidiaries or affiliates" (hereafter in this Article simply "agents"). The candidate will also be required to agree, in the event of appointment, to divulge any future proposals it might receive to create such interests, and promise to obtain Conference approval thereof before accepting any such proposal. Such interests so divulged, if any, exclusive of financial interests, will not affect the qualification of the Neutral Body when appointed by the Conference with knowledge thereof, and the members will not raise an objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint

against a member with which it may have such an interest. After disqualifying itself the Neutral Body is authorized to appoint an agent without such interest in the respondent to conduct the particular investigation and handle the complaint on behalf of the Neutral Body and such appointee shall have all of the authority and duties of the Neutral Body for that particular matter up through the date when the appointee reports its decision to the Ethics Committee under this Article 25(f)(4).

(3) The Neutral Body will have the authority and responsibility to engage agents, lawyers and/or experts, including shipping experts, who can assist with its investigation and consideration of complaints and to pay on behalf of the Conference all costs incidental thereto. Such agents or experts appointed by the Neutral Body must not have any interest in the particular member named in the particular complaint, although they will not be disqualified because they may have an interest, exclusive of a financial interest, with any other member or its agents.

(4) For purposes of this paragraph (a), the words "financial interests" do not include professional or business relationships whereby the Neutral Body or its agents or experts are engaged as independent contractors for professional or business services.

(b) Jurisdiction of the Neutral Body:

(1) The Neutral Body shall have jurisdiction to handle, in accordance with the procedures of this Article all written complaints submitted to the Neutral Body by the Conference Chairman or a member alleging breach of the Conference Agreement, Tariff Rates, or Rules and Regulations, involving malpractice or, on its own motion, any breaches of the terms of this Article 25; ~~provided, that nothing herein contained shall change the functions of the Misrating Committee.~~

(2) "Malpractice" as used in this Article shall mean any direct or indirect favor, benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer, or other cargo interests or any of their agents, on any other act or practice resulting in unfair competitive advantage over other members.

(3) The Neutral Body shall have no authority to investigate any breach involving a malpractice which occurred more than two years before the filing of a written complaint pursuant to Article 25(b)(1), or more than two years before the discovery thereof under Article 25(f)(1).

(c) Member Lines' Responsibility to Report Breaches and Assist Investigations:

(1) The members and/or the Conference Chairman shall report promptly to the Neutral Body in a written complaint any and all information

of whatsoever kind or nature coming to their knowledge which, in their opinion, indicates a breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or any breach of this Article 25 by a member or its agents, and failure to report such information by any member will be a breach of this Article.

(d) Investigation:

(1) The Neutral Body and/or its agents, shall have the power, authority and responsibility to investigate written complaints and in investigating said complaints to call upon a member or its agents at any of their offices during office hours and inspect, copy and/or obtain "correspondence, records, documents, signed written statements or oral information and/or other materials" (hereinafter in this Article "materials"), which materials are deemed by the Neutral Body in its sole discretion to be relevant to the complaint. Upon making such a call the Neutral Body shall have the right to see and copy such materials immediately and without prior screening by the member or its agents.

(2) Correspondingly each of the members shall have the duty and responsibility to supply such materials, and to cooperate in interviews promptly upon demand made in person by the Neutral Body or its agents and without prior screening, whether said materials or personnel are located in the member's own offices or in its agents' offices. Failure of a member or its agents to supply the materials required by the Neutral Body or its agents promptly will constitute a breach of this Agreement by the member, and the member undertakes to thoroughly inform its agents of the member's liability for their conduct and obtain their commitment to comply with the Conference Agreement, Tariff Rates or Rules and Regulations. In addition the members undertake an affirmative duty to cooperate and assist the Neutral Body in obtaining other required information whenever possible.

(3) The records of the Conference will be made available to the Neutral Body on request and the Conference Chairman and staff will render all assistance possible to the Neutral Body during investigations.

(e) Confidential Information:

(1) The Neutral Body will under no circumstances disclose the name of the complainant to the respondent or anyone else, including the Neutral Body's agents, unless specifically authorized to do so by the complainant.

(2) The Neutral Body will treat all information received during investigations regardless of the sources, as confidential and will not divulge any such information to anyone, except in reporting breaches found and damages assessed to the Ethics Committee, and then only to the extent that the Neutral Body itself seems appropriate.

(f) Hearing for the Respondent; Neutral Body Decisions and Announcement Thereof:

(1) On concluding its investigation, the Neutral Body will consider the information obtained and decide in its absolute discretion whether the facts have been sufficiently established to constitute a breach of the Agreement, Tariff Rates, or Rules and Regulations, involving a malpractice, and if a breach involving a malpractice is found which was not covered by the complaint, such breach may also be reported and damages may be assessed thereon against any member liable.

(2) In deciding whether a breach exists based on the results of its investigation, the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead it will employ rules of common sense in determining breaches and assessing damages and the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach occurred.

~~(3) After the Neutral Body has completed its investigation and arrived at its tentative decision that there was a breach (but before announcing the breach to the Ethics Committee, and even before the amount of damages is decided), the Neutral Body will inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose. Within fifteen (15) days, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or counsel, and offer to the Neutral Body such explanation as it may choose at such meeting.~~

(3) After the Neutral Body has completed its investigation, it shall advise the respondent either that a breach has not been found or that there are reasonable grounds to believe that a breach occurred. In the latter event, the respondent will be informed at this time of the nature of the alleged breach, and the evidence concerning it which the Neutral Body in its absolute discretion is able to disclose. In so advising the respondent, the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information. In all cases, however, the Neutral Body will inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fair play. Within fifteen (15) days, or within such reasonable time thereafter as the Neutral Body may in its sole discretion grant, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explanations and/or rebutting evidence as it may deem proper and desirable. At such hearing, the Neutral Body shall consider all of the available evidence and make its decision in accordance with the standards set forth under Article 25(f)(2) hereof.

(4) ~~The Neutral Body will then make its final decision and either discharge the respondent, or assess liquidated damages against him.~~ On the basis of its decision, the respondent shall either be advised that a breach has not been found or, should a breach be determined to have been committed, assessed liquidated damages. In assessing said damages, the members recognize that breaches of the Conference Agreement, Tariff Rates or Rules and Regulations cause substantial damages, not only in lost freight but in consequent instability of the Conference rate structure. The members further recognize that the damages caused are cumulative with the number of breaches, but the members further recognize that it is difficult to assess such damages precisely. Therefore the Neutral Body is authorized to assess liquidated damages in accordance with the following schedule:

- a) First breach: maximum of Ten Thousand Dollars (\$10,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- b) Second breach: maximum of Fifteen Thousand Dollars (\$15,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- c) Third breach: maximum of Twenty Thousand Dollars (\$20,000) U.S.A. currency or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- d) Fourth breach and subsequent breaches: maximum of Thirty Thousand Dollars (\$30,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

Notwithstanding the difficulty in assessing such damages precisely, in determining the amount of liquidated damages to be assessed the Neutral Body shall consider such mitigating circumstances as it may deem relevant.

After its decision the Neutral Body will then report to the Ethics Committee the decision and the amount of the damage assessed, if any. In addition the Neutral Body may report evidence or information discovered during its investigation, but the extent of such further reporting, if any, shall be subject to absolute discretion of the Neutral Body, and in no event will the Neutral Body report the name of the complainant without consent, or report confidential information.

(5) The Ethics Committee will notify the members through the Chairman, of the decision and damages, if any, and will also at the same time instruct the Chairman to notify the respondent of the decision, ~~but only if a breach is found, and in such case~~ and in case of a breach the respondent will be furnished with the Neutral Body report and a Conference debit note covering the liquidated damages assessed.

(g) Unquestioned Recognition of Decisions of the Neutral Body:

(1) The members agree to accept the decisions of the Neutral Body as valid, conclusive and unimpeachable, but it is understood between the members that decisions of the Neutral Body are not admissions or proof of guilt or liability under law.

(2) The members further agree that neither jointly or severally will they bring any action whatsoever against the Neutral Body or its agents for damages allegedly arising out of its acts, omissions and/or decisions as the Neutral Body. In addition each member agrees to hold the other members of the Conference and the Neutral Body and its agents harmless from any claims which may be brought by its agents or employees against another member, the Conference or the Neutral Body, or its agents for damages allegedly arising out of the Neutral Body's acts or functions.

(h) Payment of Damages:

(1) The members will pay all damages fully assessed by the Neutral Body upon receipt of a debit note from the Chairman, and if not paid within thirty (30) days of receipt of the debit note, the damages will become delinquent under Article 28 of the Conference Agreement.

(2) The Neutral Body will have the power and responsibility immediately, without notice to or further authority from the Conference, to collect as agent for the Conference and by any measures recommended by legal counsel, any damages duly assessed, as soon as they become delinquent, from the deposit or substitute security submitted and maintained by the members under Article 12 of this Agreement. The Neutral Body will pay over to the Conference immediately all damages collected.

IN WITNESS WHEREOF the Trans-Pacific Freight Conference of Japan, the members of which are all hereinafter listed, has authorized the foregoing amendments by resolution duly passed at its Special Meeting held January 8, 1965, Tokyo, Japan.

American Mail Line, Ltd.

American President Lines, Ltd.

Barber-Wilhelmsen Line

Wilhelmsens Dampskibsaktieselskab

A/S Den Norske Afrika-og Australielinie

A/S Tonsberg

A/S Tankfart I

A/S Tankfart IV

A/S Tankfart V

A/S Tankfart VI

(as one member or party only)

Fern-Ville Lines

Fearnley & Eger and A. F. Klaveness & Co. A/S

Skibsaktieselskabet Varild

Aksjeselskapet Marina

Aktieselskabet Glittre

Dampskibsinteressentskabet Garonne

Aktieselskabet Standard

Fearnley & Egers Befragtningsforretning A/S

Skibsaktieselskapet Solstad

Skibsaktieselskapet Siljestad

Universal Trading & Shipping Agency Aksjeselskap

(as one member or party only)

Japan Line, Ltd.

Kawasaki Kisen Kaisha, Ltd.

Knutsen Line

Dampskibsaktieselskapet Jeanette Skinner

Skibsaktieselskapet Pacific

Skibsaktieselskapet Marie Bakke

Dampskibsaktieselskapet Golden Gate

Dampskibsaktieselskapet Lisbeth

Skibsaktieselskapet Ogeka

Hvalfangstaktieselskapet Suderöy

(as one party only)

Maritime Company of the Philippines

Mitsui O.S.K. Lines, Ltd.

A. P. Moller-Maersk Line

Dampskibsselskabet af 1912 Aktieselskab

Aktieselskabet Dampskibsselskabet Svendborg

(as one party only)

National Development Company
 Nippon Yusen Kaisha
 Pacific Far East Line, Inc.
 Showa Shipping Co., Ltd.
 States Marine Lines
 States Marine Lines, Inc.
 Global Bulk Transport Incorporated
 (as one member only)

States Steamship Company
 United Philippine Lines, Inc.
 United States Lines Company
 (American Pioneer Line)

Waterman Steamship Corporation
 Yamashita-Shinnihon Steamship Co., Ltd.

January 8, 1965

D. P. Gillette, Chairman
 per Secretary Pro Tem

TRANS-PACIFIC FREIGHT
 CONFERENCE OF JAPAN

EXHIBIT 83

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE
TokyoCONFIDENTIAL
MEMO CIRCULAR NO. JAG-4/65
January 12, 1965TO ALL MEMBERS:NEUTRAL BODY AMENDMENT
CONFERENCE AGREEMENT NO. 3103, AS AMENDED -
AMENDMENT NO. 3103-17, ARTICLES 10, 12 & 25 -
FMC DOCKET NO. 1095

Ref:	Conf.	Memo	Circular	No.	JAG-464/64
	"	"	"	No.	JAG-479/64
	"	"	"	No.	JAG-480/64
	"	"	"	No.	JAG-481/64

The Conference, at its Special Meeting held January 8, 1965, adopted the resolution as recommended by the Neutral Body Committee.

For members' information, attached hereto is a copy of communication with a Memorandum of Amendment to Conference Agreement No. 3103, as amended, dispatched to the Federal Maritime Commission on January 8, 1965.

C. A. Cole, Jr., Chairman

Encl.

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

Kindai Bldg., 11, 3-Chome, Kyobashi, Chuo-ku
TOKYO

Cable Address

JACONFER

Telephone 535-6336

A. COLE, JR.
Chairman

January 8, 1965

Registered Air Mail

Federal Maritime Commission
Washington, D. C. 20573
U. S. A.

Attn: Mr. William A. Stigler, Director
Bureau of Foreign Regulation

Memorandum of Amendment to the
Japan-Atlantic & Gulf Freight Conference
Agreement No. 3103, As Amended

Dear Sirs:

We enclose herewith a Memorandum of Amendment to Japan-Atlantic & Gulf Freight Conference Agreement No. 3103, as amended. The amendments covered in this Memorandum were approved by the members at the Special Meeting of the Japan-Atlantic & Gulf Freight Conference held on January 8, 1965.

We are filing this Memorandum in compliance with Section 15 of the Shipping Act of 1916 and hereby request approval thereof by the Federal Maritime Commission.

Please note that the amendments as set forth in the enclosed Memorandum include the amendment to Article 25(f)(2) as adopted October 14, 1964 and filed under cover of our letter October 15, 1964 and the

amendment to Article 10(d) as adopted December 16, 1964 as part of amendments in Agreement 3103-25 and filed under cover of our letter December 19, 1964.

We thank you for your usual courtesies.

Yours very truly,

/s/ C. A. Cole, Jr.
Chairman

CAC/yw
Encl.

**MEMORANDUM OF AMENDMENT
TO JAPAN-ATLANTIC & GULF FREIGHT CONFERENCE
AGREEMENT NO. 3103, AS AMENDED**

MEMORANDUM OF AMENDMENT approved January 8, 1965 at the Special Meeting held in the City of Tokyo by the members signatory to the Japan-Atlantic & Gulf Freight Conference Agreement No. 3103, as amended,

WITNESSETH:

WHEREAS the members of the Japan-Atlantic & Gulf Freight Conference are parties to an Agreement designated the Federal Maritime Commission Agreement No. 3103, as amended, and approved by the Federal Maritime Commission and/or its predecessors in the administration of the Shipping Act of 1916 (said Agreement as so amended and approved hereinafter referred to as the "Conference Agreement"); and

WHEREAS, the Conference, although acting under no legal requirement, desires to amend further Articles 10 and 25 in amendments now pending approval of the Federal Maritime Commission in Agreement 3103-17 in order to achieve optimum clarity, fairness and effectiveness.

NOW THEREFORE THE SAID ARTICLES ARE HEREBY AMENDED TO READ AS FOLLOWS (the parts to be deleted are crossed out and the parts to be added are underlined):

* * * * *

EXHIBIT 86

BEFORE THE FEDERAL MARITIME COMMISSION

AGREEMENT NO. 150-21, TRANS-PACIFIC
FREIGHT CONFERENCE OF JAPAN AND
AGREEMENT NO. 3103-17, JAPAN-ATLANTIC
AND GULF FREIGHT CONFERENCE

DOCKET NO. 1095

AFFIDAVIT OF FACTS

JAPAN)
CITY OF TOKYO)
EMBASSY OF THE UNITED STATES OF AMERICA)

Before me, William F. Kingsbury, Vice Consul of the United States of America, duly commissioned and qualified in and for Tokyo, Japan, personally appeared Mr. Donald P. Gillette, who first being duly sworn, deposes and says:

1. That he is a citizen of the United States and resides in Yokohama, Japan.
2. That he is the Chairman of the Trans-Pacific Freight Conference of Japan.
3. That he has reviewed the available records of the Conference in regard to the provisions of the Conference Agreement (Agreement No. 150 as from time to time amended) as to the number of votes required for adoption of amendments of the said Agreement and the other matters herein set forth. That according to his information and belief the original Agreement No. 150 of the Conference was adopted by the Conference on May 1, 1930 and was approved by the United States Shipping Board on April 22, 1931; but that the prewar records of the Conference located in Japan were destroyed in World War II and are not now available.

4. That the Conference was domiciled in Seattle, Washington, during World War II and was redomiciled in Japan on September 29, 1948. That the provision of the Conference Agreement No. 150, in force and effect at the time that the Conference was redomiciled in Japan in 1948 as aforesaid, was Article 2(d), which reads as follows:

Article 2.

"2(d). At meetings of the Conference for considering the scale of rates to be adopted or any revision of the scale in effect or for any other purpose (except as referred to in Paragraph 4) each of the parties hereto shall be represented by one representative, but in the event of a representative being unable to attend, such party may vote by proxy on notification thereof being lodged with the Secretary of the Conference and the decision of the Conference must be by a majority of not less than three-fourths of all the members of the Conference, it being agreed and understood that all decisions shall be effective and binding on all parties hereto."

And that Paragraph (4) abovementioned dealt with expulsion from Membership only.

5. That States Marine Lines joined the Conference as a Member effective March 1, 1949 and that the above provision of Article 2(d) was still in full force and effect as the voting rule of the Conference at that time. That States Marine Lines was still a Member of the Conference in 1952, when the above voting rule was replaced by new Articles 18 and 19, reading as follows:

"18. QUORUM. Three-fourths of all parties entitled to vote shall constitute a quorum at all meetings, except when considering changes in this agreement when a quorum shall consist of four-fifths of all parties entitled to vote.

- "19. DECISIONS. (a) A quorum being present, decisions under this agreement, other than changes in the agreement itself, are to be determined by a two-thirds vote of all parties present and entitled to vote. In cases of changes in this agreement, all parties agree to be bound by changes made with the consent of two-thirds of all parties entitled to vote.

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EXHIBIT 87

BEFORE THE FEDERAL MARITIME COMMISSION

AGREEMENT NO. 150-21, TRANS-PACIFIC)	
FREIGHT CONFERENCE OF JAPAN AND)	
AGREEMENT NO. 3103-17, JAPAN-ATLANTIC)	DOCKET NO. 1095
AND GULF FREIGHT CONFERENCE)	

AFFIDAVIT OF FACTS

JAPAN)
 CITY OF TOKYO)
 EMBASSY OF THE UNITED STATES OF AMERICA)

Before me, William F. Kingsbury, Vice Consul of the United States of America, duly commissioned and qualified in and for Tokyo, Japan, personally appeared Mr. Chester A. Cole, Jr., who first being duly sworn, deposes and say:

1. That he is a citizen of the United States and resides in Tokyo, Japan.
2. That he is the Chairman of the Japan-Atlantic and Gulf Freight Conference.
3. That he has reviewed the available records of the Conference in regard to the provisions of the Conference Agreement (Agreement No. 3103 as from time to time amended) as to the number of votes required for adoption of amendments of the said Agreement and also in regard to the actual voting upon each such amendment and also in regard to the other matters herein set forth. That according to his information and belief, the original Agreement No. 3103 of this Conference was adopted by the Conference on 23 May, 1934, and was approved by the predecessor of the Federal Maritime Commission on June 25, 1934. But that the pre-war records of the Conference located in Japan were destroyed in World

War II and are not now available. That the Conference was domiciled in New York during World War II and was redomiciled in Japan on December 19, 1948, and that some but not all of the prewar records of the Conference were preserved in New York and were brought back to Japan and are now available to him.

4. That his records do not contain the said original Agreement No. 3103 but do contain the said Agreement as amended in 1939 by the first Amendment thereto, which was adopted and approved as Agreement No. 3103-1. That the said Amendment No. 3103-1 added only an Article 9 to provide for "open" membership and so did not affect the voting provision of the original Agreement, wherefore the voting provision in Agreement No. 3103-1 may be presumed to be the same provision as in the original Agreement No. 3103. That the said voting provision in Agreement No. 3103-1 is as follows:

"Article 2(d).

At meetings of the Conference for considering the scale of rates to be adopted or any revision of the scale in effect or for any other purpose (except as referred to in Par. 4) each of the parties hereto shall be represented by one representative, but in the event of a representative being unable to attend, such party may vote by proxy on notification thereof being lodged with the Secretary of the Conference and the decision of the Conference must be by a majority of not less than two-thirds of all the members of the Conference, it being agreed and understood that all decisions shall be effective and binding on all parties hereto."

That the said Agreement No. 3103-1 was adopted by the Conference on August 7, 1939 and approved by the predecessor of the Federal Maritime Commission on October 17, 1939. That a counterpart copy of the said Agreement No. 3103, as amended by Agreement No. 3103-1, was signed by all Members of the Conference, including States Marine Corporation by J. O. Senner, Vice-President, although the date of the latter signature is not recorded.

5. That States Marine Corporation became a Member of the Conference as of October 14, 1947. That States Marine Corporation of Delaware was added to States Marine Corporation, whereby the two companies constituted a single Member of the Conference, as of May 1, 1948. That the said two companies, as one party in Membership, withdrew from membership of the Conference as of November 5, 1954. That on the respective dates aforesaid, when States Marine Corporation and States Marine Corporation of Delaware joined the Conference, the above-quoted Article 2(d) remained still unchanged and in full force and effect as the voting provision of the Conference Agreement. That during the said period of Membership of the said two Companies, namely in 1952, a new voting provision, replacing the aforesaid Article 2(d), was duly adopted by the Conference and approved by the predecessor of the Federal Maritime Commission as a part of Agreement No. 3103-5. That a counterpart copy of the said Agreement No. 3103-5, containing the new voting provision, was signed by all Members, including States Marine Lines as follows:

"States Marine Lines

States Marine Corporation, New York
States Marine Corporation of Delaware

by Carl Culver."

That the part of Agreement No. 3103-5 which embodied the new voting provision was Article 18 and Article 19, which read as follows:

"Article 18. QUORUM.

Three-fourths of all parties entitled to vote shall constitute a quorum at all meetings, except when considering changes in this agreement when a quorum shall consist of four-fifths of all parties entitled to vote.

"Article 19. DECISIONS.

(a) A quorum being present, decisions under this agreement, other than changes in the

agreement itself, are to be determined by a two-thirds vote of all parties present and entitled to vote. In cases of changes in this agreement, all parties agree to be bound by changes made with the consent of two-thirds of all parties entitled to vote

(b) The Chairman shall have authority, with respect to decisions on rate matters, to obtain the votes of the parties by telephone in lieu of meeting in conference. All members entitled to vote must be contacted and their votes obtained in each case. Decisions on matters voted on by telephone shall be made by a two-thirds vote of all parties entitled to vote.

(c) At the request of any member, voting shall be by secret ballot which shall be counted by the Secretary who shall announce the result of the ballot."

That prior to the adoption of the final form of Agreement No. 3103-5 as a whole, there had been a series of Meetings of the Conference at which various parts of it were considered and approved by the Conference. That the final adoption of the whole of Agreement No. 3103-5, including the part containing Articles 18 and 19, was done by the Conference by unanimous vote at a Meeting of the Conference upon April 30, 1952, and that the same Meeting likewise by unanimous vote authorized the said Agreement to be filed for the approval of the predecessor of the Federal Maritime Commission. That States Marine Lines as a Member was a party to the said Meeting and that Mr. Carl Culver of States Marine Lines presided over the said Meeting as Chairman. That subsequently, Agreement No. 3103-5 was duly filed and approved by the predecessor of the Federal Maritime Commission and that a counterpart copy of the said Conference Agreement No. 3103, as amended and approved as of August 27, 1952, including the new voting provision of Articles 18 and 19, was signed by all Members, including States Marine Lines by Mr. Carl Culver in the manner above-quoted. That the voting provision which it contained remained in full force and effect during the remaining period of Membership of States Marine Lines, until and after the aforesaid withdrawal of States Marine Lines from Membership upon November 5, 1954.

EXHIBIT 88

AGREEMENT NO. 150
(Transpacific Freight Conference of Japan)

Record of Voting on Amendments to Conference Agreement as Shown in Minutes of Meetings:

Items	Meeting No.	Amend. No.	Date of Conference Meeting	Subject	Vote
1	11	2	5/20/49	Modification to include Korea within scope of agreement.	Agreed
2	34	3	9/27/50	Okinawa included in Conference agreement	Carried
3	44	4	4/25/51	Motion to restrict number of agents and sub-agents	For 12 - Opp. 2 - Abstain 1/ 2 - Lost
4	44	4	4/25/51	Motion to limit sub-agents commissions to 5%	For 13 - Abstain 3 Carried
5	45	4	5/29/51	Motion to restrict number of agents and sub-agents; inland agents prohibited	For 15 - Opp. 2 - Abstain 1 Carried ^{2/}
6	50	4	10/25/51	Motion that decisions under the agreement will be carried by two-thirds vote of parties present and entitled to vote. Changes in agreement will be carried by two-thirds vote of all parties entitled to vote.	For 15 - Opp. 4 - Abstain 1 Carried ^{3/}

^{1/} The Minutes state "Motion Lost." However, the vote was sufficient to carry and the Amendment was in fact submitted to the Federal Maritime Board for approval.

^{2/} The following note appeared in the Minutes under the tally of votes:

"Note: One member line wished it placed on record that he believed this matter was outside Conference jurisdiction and the Conference could not dictate to principals as to what they may or may not do regarding their Agency arrangements."

^{3/} This Agreement was not submitted for approval.

Items	Meeting No.	Amend. No.	Date of Conference Meeting	Subject	Vote
7	50	4	10/25/51	Motion to amend Article 17	For 18 - Opp. 1 - Abstain 1 - Carried
8	50	4	10/25/51	Motion to restrict agents, sub-agents, and percentage of commissions <u>4/</u>	Carried Unani- mously
9	51		11/29/51	Motion to change wording of agents clause <u>5/</u>	Carried Unani- mously
10	Special	5	7/3/52	Adopted revisions suggested by F. M. B.	For 22 - Opp. 0 - Abstain 1 Carried
11	71	6	7/29/53 ^{6/}	Amendments to Article 10, Breaches and Article 29, Consular Invoices and Freight Manifests	Carried Unani- mously
12	110	7	10/19/56	Amendment to Article 1, Purpose of Agreement	Motion carried
13	122	8	10/18/57	Motion to amend Article 6(b)	Motion carried
14	125	9	1/22/58	Amendment of Article 6(a), Rebating	Motion carried
15	Special	10	3/12/58	Motion to amend Article 19	Motion carried
16	133	11	9/17/58	Amendments to numerous articles of conference agree- ment in range of Articles 10-26A	Motion carried

^{4/} This was a motion to authorize the filing of items 5 and 6, which were amendments agreed to at previous meetings of 4/25/51 and 5/29/51.

^{5/} These clauses were adopted originally at the meetings of 4/25/51 and 5/29/51 - Items 4 and 5.

^{6/} At this meeting, it was moved and unanimously carried that the minutes of future meetings omit the tally of votes, and merely state "Motion Carried" or "Motion Failed."

Items	Meeting No.	Amend. No.	Date of Conference Meeting	Subject	Vote
17	133	12	9/17/58	Amendment to Article 4 and Article 31	Motion carried
18	136	13	12/15/58	Amendments to Articles 2, 7, 9, 10(a), 25, 31(a), (b), (c)	Amendments approved
19	138	14	2/18/59	Amendments to Article 19(b), Decisions	Motion carried
20	Special	15	3/10-12/59	Amendment to Article 23(c), Voting	Motion carried
21	139	16	4/22/59	Amendment to Article 23(c), Voting	Motion carried
22	140	17	7/22/59	Amendment to Article 31, Responsibility for Acts of Agents	Unanimously agreed
23	145	18	10/21/59	Preamble - Inclusion of Alaskan ports	Motion carried
24	153	19	6/15/60	Amendment to Article 23(c), Voting	Motion carried
25	Special	20	9/26-30/60	Amendment to Article 23(c), Voting	Motion carried
26	172	21	1/24/62	Amendment to Articles 6, 10, 12, 25 - Neutral Body	Motion carried
27	205	21	10/14/64	Amendment to Article 25(f) (2) "probably" Amendment	Motion carried
28	162	22	3/15/61	Amendment to Article 31, Responsibility for Acts of Agents	Motion carried

Items	Meeting No.	Amend. No.	Date of Conference Meeting	Subject	Vote
7	50	4	10/25/51	Motion to amend Article 17	For 18 - Opp. 1 - Abstain 1 - Carried
8	50	4	10/25/51	Motion to restrict agents, sub-agents, and percentage of commissions <u>4/</u>	Carried Unani- mously
9	51		11/29/51	Motion to change wording of agents clause <u>5/</u>	Carried Unani- mously
10	Special	5	7/3/52	Adopted revisions suggested by F. M. B.	For 22 - Opp. 0 - Abstain 1 Carried
11	71	6	7/29/53 ^{6/}	Amendments to Article 10, Breaches and Article 29, Consular Invoices and Freight Manifests	Carried Unani- mously
12	110	7	10/19/56	Amendment to Article 1, Purpose of Agreement	Motion carried
13	122	8	10/18/57	Motion to amend Article 6(b)	Motion carried
14	125	9	1/22/58	Amendment of Article 6(a), Rebating	Motion carried
15	Special	10	3/12/58	Motion to amend Article 19	Motion carried
16	133	11	9/17/58	Amendments to numerous articles of conference agreement in range of Articles 10-26A	Motion carried

^{4/} This was a motion to authorize the filing of items 5 and 6, which were amendments agreed to at previous meetings of 4/25/51 and 5/29/51.

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Items	Meeting No.	Amend. No.	Date of Conference Meeting	Subject	Vote
17	133	12	9/17/58	Amendment to Article 4 and Article 31	Motion carried
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19	138	14	2/18/59	Amendments to Article 19(b), Decisions	Motion carried
20	Special	15	3/10-12/59	Amendment to Article 23(c), Voting	Motion carried
21	139	16	4/22/59	Amendment to Article 23(c), Voting	Motion carried
22	140	17	7/22/59	Amendment to Article 31, Responsibility for Acts of Agents	Unanimously agreed
23	145	18	10/21/59	Preamble - Inclusion of Alaskan ports	Motion carried
24	153	19	6/15/60	Amendment to Article 23(c), Voting	Motion carried
25	Special	20	9/26-30/60	Amendment to Article 23(c), Voting	Motion carried
26	172	21	1/24/62	Amendment to Articles 6, 10, 12, 25 - Neutral Body	Motion carried
27	205	21	10/14/64	Amendment to Article 25(f) (2) "probably" Amendment	Motion carried
28	162	22	3/15/61	Amendment to Article 31, Responsibility for Acts of Agents	Motion carried

<u>Items</u>	<u>Meeting No.</u>	<u>Amend. No.</u>	<u>Date of Conference Meeting</u>	<u>Subject</u>	<u>Vote</u>
29	167	23	8/16/61	Amendment to Article 23(c), Voting	Motion carried
30	171	24	12/13/61	Amendment to Article 23(c), Voting	Motion carried
31	Special	24	12/26/62	Amendment to Article 23(c), Voting	Motion carried
32	177	25	6/13/62	Amendment to Article 13, Membership	Motion carried
33	Special	26	6/5/63	Amendment to Article 6, Agents and sub- agents	Unani- mously agreed
34	197	27	2/19/64	Conference membership	Motion carried
35	201	28	6/17/64	Amendment to Articles 13, 20, and 26 - Member- ship, Voting, Maintenance of Service	Motion carried

EXHIBIT 89

AGREEMENT NO. 3103
(Japan-Atlantic and Gulf Freight Conference)

Record of Voting on Amendments to Conference Agreements as Shown in Minutes of Meetings:

Items	Meeting No.	Amend. No.	Date of Conference Meeting	Subject	Vote
1	Letter 7/17/39	1		Amendment to Article 9	Agreed ^{1/}
2	21-A	2	11/26/47	Amendment to Articles 1 and 2(c), Scope of Conference	Unanimously agreed
3	6	3	4/28/49	Amendment to Articles 1 and 2(c), Scope of Conference	Unanimously ^{2/} carried
4	Letter 12/13/50	4		Amendment to Articles 1 and 2 (c), Scope of Conference	Agreed
5	46	5	10/25/51	Amendment to Article 5 - Payment of Commissions and Brokerage	Unanimously ^{3/} agreed
6	52	6	4/30/52	Amendment to Preamble and all Articles	Unanimously agreed
7	Special		7/3/52	(Modification)	For 17 - Opp. 0 Abstain 1
8	67	7	7/29/53	Amendment to Article 10 and 29, Breaches of Agreement, Freight Manifest	Unanimously agreed

^{1/} Letter merely states that member lines agree to adopt new Clause 9.

^{2/} Unanimity vote reported by Chairman Dennean's letter of 9/12/49.

^{3/} At a previous conference meeting of May 29, 1951, Meeting No. 41, a vote was taken on a portion of this amendment, at which time the vote was 9 For, 3 Opposed. The motion carried. However, no amendment was submitted for approval pursuant to this vote.

Items	Meeting No.	Amend. No.	Date of Conference Meeting	Subject	Vote
9	118	8	10/18/57	Amendment to Article 6(b)	Agreed
10	120		12/18/57	(Modification) Limitation of number of agents	Agreed
11	121	9	1/22/58	Article 6(a) (Amendment to) Payment of com- missions	Agreed
12	129	10	9/17/58	Amendment to Articles 4 and 31	Motion carried
13	130	11	10/22/58	Amendment to Articles 10(a), 11, 19(c), 21(a), 21(b), 21(c), 21(d), 21(e), 22, 23(a), 23(b), 24, 24-A and 25	Carried
14	132	12	12/15/58	Amendment to Articles 2, 7, 9, 10(a), 25, 31(a), 31(b), 31(c), 31(d), and 31(e)	Approved
15	134	13	2/18/59	Article 19(b), Voting	Carried
16	138	14	7/22/59	Article 31, Bonding Requirement	Carried
17	Special	15	4/8/60	Fidelity Commis- sion System, Docket No. 908	Carried
18	Special		10/11/61	(Withdrawn)	Carried
19	Special	16	1/10/61	Inclusion of Great Lakes - St. Lawrence River	Carried
20	Special		11/2/61	(Withdrawn)	Carried

<u>Items</u>	<u>Meeting No.</u>	<u>Amend. No.</u>	<u>Date of Conference Meeting</u>	<u>Subject</u>	<u>Vote</u>
21	157	17	2/15/61	Articles 10, 12 and 25, Neutral Body Amend- ments	Carried
22	168		1/24/62	Modifications	Carried
23	169		2/14/62	Modification, Article 12, Bonding Re- quirements	Carried

Items	Meeting No.	Amend. No.	Date of Conference Meeting	Subject	Vote
9	118	8	10/18/57	Amendment to Article 6(b)	Agreed
10	120		12/18/57	(Modification) Limitation of number of agents	Agreed
11	121	9	1/22/58	Article 6(a) (Amendment to) Payment of com- missions	Agreed
12	129	10	9/17/58	Amendment to Articles 4 and 31	Motion carried
13	130	11	10/22/58	Amendment to Articles 10(a), 11, 19(c), 21(a), 21(b), 21(c), 21(d), 21(e), 22, 23(a), 23(b), 24, 24-A and 25	Carried
14	132	12	12/15/58	Amendment to Articles 2, 7, 9, 10(a), 25, 31(a), 31(b), 31(c), 31(d), and 31(e)	Approved
15	134	13	2/18/59	Article 19(b), Voting	Carried
16	138	14	7/22/59	Article 31, Bonding Requirement	Carried
17	Special	15	4/8/60	Fidelity Commis- sion System, Docket No. 908	Carried
18	Special		10/11/61	(Withdrawn)	Carried
19	Special	16	1/10/61	Inclusion of Great Lakes - St. Lawrence River	Carried
20	Special		11/2/61	(Withdrawn)	Carried

<u>Items</u>	<u>Meeting No.</u>	<u>Amend. No.</u>	<u>Date of Conference Meeting</u>	<u>Subject</u>	<u>Vote</u>
21	157	17	2/15/61	Articles 10, 12 and 25, Neutral Body Amend- ments	Carried
22	168		1/24/62	Modifications	Carried
23	169		2/14/62	Modification, Article 12, Bonding Re- quirements	Carried

SECTION IVOTING REQUIREMENTS IN APPROVED CONFERENCE AGREEMENTS
WITH RATE MAKING AUTHORITY IN EFFECT AS OF MARCH 5, 1965

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
14-1	Trans-Pacific Freight Conference (Hong Kong)	2/3 vote of quorum consisting of 3/4 of all members entitled to vote on all matters except amendments to the agreement require 2/3 vote of quorum of 4/5 of all members entitled to vote.
17	Far East Conference	Majority vote of conference membership on all matters except the selection of the chairman and fixing of duties may be 2/3 vote.
50-1	Pacific Coast Australasian Tariff Bureau	Unanimous vote of all members present at meeting and entitled to vote on all matters.
57	Pacific Westbound Conference	2/3 vote of members entitled to vote, except amendments to the agreement require unanimous vote of the membership.
59	River Plate and Brazil Conferences	2/3 vote of members entitled to vote on all matters.
85	Trans-Pacific Freight Conference of North China	Majority vote of 2/3 of voting membership on all matters.
90	Java - New York Rate Agreement	Majority vote of membership on all matters except 2/3 vote of majority for admission to membership.
93	Outward Continental North Pacific Freight Conference	Unanimous vote of all members entitled to vote on all matters.
134	Gulf/Mediterranean Ports Conference	Majority vote of membership present at meeting on all matters except amendments to the agreement require unanimous vote of those present.

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
150	Trans-Pacific Freight Conference of Japan	2/3 vote of quorum consisting of 3/4 of all members entitled to vote on all matters except amendments to the agreement require 2/3 vote of quorum of 4/5 of all members entitled to vote.
161	Gulf/United Kingdom Conference	Majority vote of all members present and entitled to vote on all matters except emergency rates and amendments to the agreement require unanimous vote.
191	Java Pacific Rate Agreement	Unanimous vote, less one, of entire membership on all mat- ters except violations of the agreement shall be determined by majority vote of the mem- bers.
192	Deli-Pacific Rate Agreement	Unanimous vote, less one, of entire membership on all mat- ters except violation of the agreement shall be determined by majority vote of the members.
194	Hong Kong/Panama Freight Conference	Majority of not less than 2/3 of all members except amendments to the agreement require unani- mous vote.
2744	Atlantic and Gulf/West Coast of South America Conference	Majority vote of a quorum of a majority of members present at meeting on all matters ex- cept amendments to the agree- ment requires unanimous vote of all conference members.
2846	The West Coast of Italy, Sicilian and Adriatic Ports/ North Atlantic Range Conference (W.I.N.A.C.)	2/3 vote of membership present at meeting on matters regarding rates of freight, commissions and contract/non-contract rates; 4/5 vote of membership on all other conference matters, except amend- ments to the agreement and ad- mission to membership require unanimous vote of the conference members.

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
3103	Japan-Atlantic and Gulf Freight Conference	2/3 vote of quorum consisting of 3/4 of all members entitled to vote on all matters except amendments to the agreement require 2/3 vote of quorum of 4/5 of all members entitled to vote.
3302	Association of West Coast Steamship Companies	Unanimous vote of membership present on all matters.
3357	United Kingdom/United States Pacific Freight Association	Unanimous vote of entire membership on all matters.
3868	Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference	Majority vote of membership present at meetings except amendments to the agreement require unanimous vote of entire membership.
4188	Gulf and South Atlantic Havana Steamship Conference	2/3 vote of membership present at meeting on all matters, except amendments to the agreement require unanimous consent of entire membership.
4189	Havana Steamship Conference	2/3 vote of membership present at meeting on all matters, except amendments to the agreement require unanimous consent of entire membership.
4610	United States Atlantic & Gulf-Jamaica Conference	Unanimous vote of membership when less than 4, and majority vote of membership when 4 or more, on all matters except expulsion from membership, violations of the agreement and amendments to the agreement require unanimous vote.
5200	Pacific Coast-European Conference	3/4 vote of membership present and entitled to vote on all matters, except amendments to the agreement require unanimous vote.
5300	Norway/North Atlantic Conference	Majority vote of all members on all matters.

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
5400	Gulf-Scandinavian and Baltic Sea Ports Conference	Unanimous vote of membership on all matters.
5450	Brazil/United States-Canada Freight Conference	2/3 vote of membership entitled to vote on all matters except limitation of sailings (article 8) and changes in the apportionment of conference expenses (article 13) require unanimous vote of conference members.
5600	Associated Steamship Lines	2/3 vote of members voting under the respective trade group; unanimous vote of entire membership required to amend the conference agreement.
5660	Marseilles/North Atlantic U.S.A. Freight Conference	Unanimous vote, less one, on all matters except amendments to the agreement require unanimous consent of entire membership.
5680	Pacific/Straits Conference	2/3 vote of membership on all matters.
5700	New York Freight Bureau (Hong Kong)	Not less than 2/3 vote of all members; amendments to the conference agreement require unanimous vote of all members.
5800	New York Freight Bureau (Shanghai)	Not less than 2/3 vote of all members; amendments to the conference agreement require unanimous vote of all members.
5850	North Atlantic Westbound Freight Association	Unanimous vote of membership on all matters.
6010	Straits/New York Conference	2/3 vote of the membership; amendments to the conference agreement require 4/5 vote of the membership.
6060	Pacific/Indonesian Conference	Unanimous vote, less one, of entire membership on all matters including amendments to the conference agreement.

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
6080	United States Atlantic and Gulf-Santo Domingo Conference	Majority vote of a quorum of a majority of all members on all matters, except that unanimous vote of a quorum of all members is required to amend the conference agreement.
6190	United States Atlantic & Gulf-Venezuela & Netherlands Antilles Conference	Not less than 3/4 vote of membership present and entitled to vote, except on expulsion from membership and amendments to the conference agreement require unanimous vote.
6200	U. S. Atlantic and Gulf/Australia New Zealand Conference	Unanimous vote of all members in meeting or by communication among members on all matters.
6400	Pacific Coast River Plate Brazil Conference	3/4 vote of all members present and entitled to vote at meetings, otherwise 3/4 vote of all members entitled to vote where there are more than four (4) members. If less than four (4) members, action may be taken by 2/3 vote on all matters. Amendments to the agreement require unanimous vote of all members present at meeting and entitled to vote.
6800	East Coast South America Reefer Conference	2/3 vote of a quorum of 2/3 of the conference membership on all matters.
6870	Agreement covering cargo of oil companies from U. S. Atlantic and Gulf ports to Curacao, Aruba and Bonaire, N.W.I. and Venezuela.	Unanimous agreement of all members on all matters.
6900	River Plate-United States-Canada Freight Conference	2/3 vote of a quorum of membership on all matters except the establishment of contract rates.
7090	Straits/Pacific Conference	2/3 vote of membership on all matters except amendments to the agreement require 4/5 vote.

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
7100	North Atlantic United Kingdom Freight Conference	Unanimous vote of a quorum of a majority of the members present at meetings required on all matters.
7190	Deli/New York Rate Agreement	2/3 vote of the members en- titled to vote on all matters.
7200	River Plate and Brazil/United States Reefer Conference	2/3 vote of a quorum of 2/3 of all members entitled to vote on all matters.
7540	Leeward & Windward Islands & Guianas Conference	2/3 vote of all members entitled to vote on all matters when there are four (4) or more mem- bers. Unanimous vote is re- quired on all matters when less than four (4) members. Amend- ments to the conference agree- ment require unanimous vote.
7550	Havana Northbound Rate Agreement	Unanimous vote of all mem- bers required on all matters.
7580	Australia, New Zealand and South Sea Islands-Pacific Coast Conference.	Unanimous vote of all mem- bers required on all matters.
7590	East Coast Columbia Conference	Majority vote of a quorum of a majority of the members present at meeting and en- titled to vote on all matters, except expulsion from mem- bership and amendments to the conference agreement re- quire unanimous vote of all members.
7630	Mid Brazil/United States- Canada Freight Conference	2/3 vote of a quorum of 2/3 of the members entitled to vote on all matters, except admis- sion to membership requires unanimous vote.
7640	North Brazil/United States- Canada Freight Conference	2/3 vote of a quorum of 2/3 of the members entitled to vote on all matters, except admis- sion to membership requires unanimous vote.

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
7650	Santiago De Cuba Conference	3/4 vote of members present at meeting and entitled to vote except admission to membership and amendments to the conference agreement require unanimous vote.
7670	North Atlantic Baltic Freight Conference	2/3 vote of a majority of the members present and voting by proxy on all matters, except admission to membership and amendments to the conference agreement require unanimous vote.
7680	American West African Freight Conference	Action on matters with respect to changes in the conference tariff shall be taken by majority vote of the members; all other actions under the conference agreement require unanimous vote.
7690	The India, Pakistan, Ceylon and Burma Outward Freight Conference	Majority vote of all members entitled to vote required on all matters, except amendments to the conference agreement require unanimous vote.
7700	The Persian Gulf Outward Freight Conference	Unanimous vote of membership on all matters.
7770	North Atlantic French Atlantic Freight Conference	Unanimous vote of all members on all matters.
7780	Gulf/South and East African Conference	Unanimous vote of all members on all matters.
7810	French North Atlantic Westbound Freight Conference	Unanimous vote of all members on all matters.
7820	United States Great Lakes-Bordeaux/Hamburg Range Eastbound Conference	Conference rates may be established or changed by 2/3 vote of the members; all other matters under the agreement require unanimous vote of the members.

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
7830	United States Great Lakes - Bordeaux/Hamburg Range West- bound Conference	Conference rates may be established or changed by 2/3 vote of the members; all other matters under the agree- ment require unanimous vote of the members.
7860	Swiss/North Atlantic Freight Conference	Unanimous vote of a majority of members present at meet- ing or by proxy on all matters. Unanimous action of all mem- bers required on matters other than at meeting.
7890	West Coast South America North- bound Conference	2/3 vote of a quorum of not less than 2/3 of the members present at meeting and entitled to vote on all matters, except amendments to the conference agreement require unanimous vote of a quorum of all mem- bers.
7980	North Atlantic Mediterranean Freight Conference	2/3 vote of a quorum of a majority of the members present and entitled to vote on all matters, except as to ad- missions, amendments to agree- ment and matter handled by tele- phone poll require unanimous vote of all the members.
8040	West Coast of India and Pakistan/U.S.A. Conference	2/3 vote of a quorum of 3/4 of members present at meet- ing on all matters, except unanimous vote is required to amend the agreement.
8050	Ceylon/U.S.A. Conference	2/3 vote of a quorum of 3/4 of the members present at meeting on all matters, ex- cept unanimous vote is re- quired to amend the conference agreement and to confirm ac- tion taken by telephone polls.
8080	Atlantic and Gulf-Indonesia Conference	2/3 vote of a quorum of 3/4 of the members present at meeting of all matters, ex- cept unanimous vote required to amend the conference agree- ment.

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
8090	Mediterranean/North Pacific Coast Freight Conference	Unanimous vote, less one, of a quorum of 3/4 of all mem- bers present at meeting and entitled to vote required on all matters.
8100	Thailand/U.S. Atlantic & Gulf Conference	2/3 vote of all members on all matters, except amendments to the conference agreement requires 4/5 vote of members.
8120	United States Atlantic and Gulf-Haiti Conference	3/4 vote of members present at meeting and entitled to vote on all matters except amend- ments to the conference agree- ment require unanimous vote.
8130	Great Lakes-United Kingdom Eastbound Conference	Unanimous vote of membership on all matters.
8140	Great Lakes-United Kingdom Westbound Congerence	Unanimous vote of member- ship on all matters.
8160	Spanish/United States North Atlantic Ports Olive Conference	Any and all actions within the scope of the agreement shall require votes based on the number of members as follows: Not more than two - unani- mous vote, membership of three - 2/3 majority vote, aand four or more members - 3/4 majority vote.
8180	U.S. Great Lakes, Scandinavian and Baltic Eastbound Conference	Unanimous vote of member- ship on all matters.
8190	Japan/Puerto Rico and Virgin Islands Freight Conference	2/3 vote of a quorum of 3/4 of the members entitled to vote on all matters except amend- ments require 2/3 vote of a quorum of 4/5 of the members entitled to vote.
8210	Continental North Atlantic West- bound Freight Conference	3/4 vote of a quorum of a majority of the members present at meetings on all matters, except unanimous vote required for admission to membership and amend- ments to the conference agree- ment.

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
8220	North Atlantic Israel Freight Conference	3/4 vote of a quorum of not less than 4/5 of the membership at meetings on all matters, except unanimous vote required for admission to membership, telephone polls and amendments to the conference agreement.
8240	Atlantic and Gulf-Singapore, Malaya and Thailand Conference	2/3 vote of a quorum of 3/4 of all members for all matters, except amendments to the conference agreement require unanimous vote.
8250	The American Great Lakes Mediterranean Eastbound Freight Conference	2/3 vote of a quorum of 3/4 membership on all matters, except amendments of the conference agreement require 3/4 vote of all members. Unanimous vote required to change method of payment of freight.
8260	Mediterranean-U.S.A. Great Lakes Westbound Freight Conference	2/3 vote of membership on all matters, except amendments to the conference agreement require 3/4 vote of all members. Unanimous vote required to change method of payment of freight.
8290	Hawaii/Orient Rate Agreement	Unanimous vote of all members required on all matters, except breach of agreement may be determined by a majority vote.
8300	Atlantic and Gulf/West Coast of Central America and Mexico Conference	Majority vote of membership present at meeting on all matters, except amendments to the conference agreement and changes in the method of collection of freight require unanimous vote of all membership.
8310	South Atlantic Steamship Conference	Unanimous vote of a quorum of 2/3 of the membership entitled to vote at meeting required on all matters.

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
8320	Scandinavian and Baltic/U.S.A. South Atlantic and Gulf West- bound Rate Agreement	Unanimous vote of membership entitled to vote, either at meet- ing or by telephone polls, re- quired on all matters.
8360	Scandinavia Baltic Great Lakes Westbound Freight Conference	2/3 vote of membership required on all matters.
8410	Hawaii/Europe Rate Agreement	Unanimous vote of members on all matters.
8420	Israel/U.S. North Atlantic Ports Westbound Freight Conference	Decisions on all matters under the agreement determined as follows: two (2) members - unanimous vote three (3) members - 2/3 majority vote four (4) or more members - 3/4 majority vote.
8470	International Household Goods Rate Agreement	Majority vote of a majority of the members on all matters.
8530	International Movers' Rate Agreement	Unanimous vote of all mem- bers on all matters.
8650	Calcutta, East Coast of India and East Pakistan/U.S.A. Conference	2/3 vote of a quorum of 3/4 of the members on all mat- ters except amendments to the conference agreement require unanimous vote of all members.
8660	Latin America/Pacific Coast Steamship Conference	Except as provided below, matters shall be determined as follows: two (2) members - unanimous vote three (3) members - 2/3 majority vote otherwise - 3/4 vote of meeting. Amendments to the conference agreement require 3/4 vote of all members. Exceptions: - unanimous vote required for matters regard- ing absorptions, representation of non-conference vessels, and to enter into other agreements as a group.

<u>AGREEMENT NUMBER</u>	<u>NAME OF CONFERENCE</u>	<u>VOTING REQUIREMENTS</u>
9214	North Atlantic Continental Freight Conference	3/4 vote of a quorum of a majority of the membership present at meetings and entitled to vote on all matters, except amendments to the conference agreement require unanimous vote.
9293	North Atlantic Portugal East-bound Freight Conference	3/4 vote of the members present at meetings, or voting by proxy, on all matters within the scope of the conference.
9364	Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference	Unanimous vote of all members on all matters.

SECTION II

VOTING REQUIREMENTS IN APPROVED RATE AGREEMENTS IN EFFECT AS OF MARCH 5, 1965

<u>AGREEMENT NUMBER</u>	<u>NAME</u>	<u>VOTING REQUIREMENTS</u>
8054	South and East Africa Rate Agreement	Action of parties limited to discussion and agreement as to rates, charges; classifications and related tariff matters, with right of any party to change its own individually maintained and published tariff upon forty-eight (48) hours notice to the other parties. No specific voting provision.
8086	Atlantic & Gulf American-Flag Berth Operators Agreement	Action by the parties requires vote of 75 per cent of participants, except that amendments to the agreement, violations of the terms thereof, and admission to membership require unanimous vote.

<u>AGREEMENT NUMBER</u>	<u>NAME</u>	<u>VOTING REQUIREMENTS</u>
8186	West Coast - American Flag Berth Operators Agreement	Unanimous vote of parties required for all matters at meetings, and by telephone polls, under the agreement.
8454	United States - Guam Trade Rate Agreement	Action of parties limited to discussion and agreement as to rates, charges, classifications and related tariff matters, with right of any party to change its own individually maintained and published tariff upon forty-eight (48) hours notice to the other parties. No specific voting provision.
8493	Trans-Pacific American-Flag Berth Operators Agreement	Unanimous vote of all parties required in all matters.
8558	Red Sea and Gulf of Aden/U.S. Atlantic and Gulf Rate Agreement	Action of parties limited to discussion and agreement as to rates, charges, classifications and related tariff matters to be charged and/or observed by them, respectively. No specific voting provision.
8585	United States - Far East Rate Agreement	Action limited to discussions and agreement with respect to positions to be taken under various conferences in the trades to which the carriers are members. No specific voting provision.
8595	Great Lakes/Japan Rate Agreement	2/3 vote of parties required on all matters.
8630	U.S. Atlantic and Gulf/Red Sea and Gulf of Aden Rate Agreement	Action of the parties limited to discussions and agreements as to rates, charges, classifications and related tariff matters to be charged or observed by the parties, respectively. No specific voting provision.

<u>AGREEMENT NUMBER</u>	<u>NAME</u>	<u>VOTING REQUIREMENTS</u>
8670	Japan/Great Lakes Rate Agree- ment	2/3 vote of a quorum of 3/4 of the parties required on all matters.
8735	U.S. Atlantic Coast/Atlantic Spain Rate Agreement	Action requires unanimous vote of the parties on all matters.
8760	West Coast United States and Canada/India, Pakistan, Ceylon and Burma Rate Agreement§	Action of parties limited to dis- cussion and agreement as to rates, charges, classifications and related tariff matters, with right of any party to change its own individually maintained and published tariff upon forty-eight (48) hours notice to the other parties. No specific voting pro- vision.
8770	United Kingdom/U.S. Gulf Ports Rate Agreement	Action of parties limited to dis- cussion and agreement as to rates, charges, classifications and related tariff matters, with right of any party to change its own individually maintained and published tariff upon forty-eight (48) hours notice to the other parties. No specific voting pro- vision.
8920	Continental European Ports/U.S.A. South Atlantic and Gulf Westbound Rate Agreement	Unanimous vote required on all matters.
9150	Bordeaux-Hamburg Range/U.S. South Atlantic Rate Agreement	Unanimous vote required on all matters.
9238	Greece/United States Atlantic Rate Agreement	Action of parties limited to dis- cussion and agreement as to rates, charges, classifications and related tariff matters, with right of any party to change its own individually maintained and published tariff upon forty-eight (48) hours notice to the other parties. No specific voting provision.

<u>AGREEMENT NUMBER</u>	<u>NAME</u>	<u>VOTING REQUIREMENTS</u>
9239	Turkey/United States Atlantic Rate Agreement	Action of parties limited to discussion and agreement as to rates, charges, classifications and related tariff matters, with right of any party to change its own individually maintained and published tariff upon forty-eight (48) hours notice to the other parties. No specific voting provision.
9247	India, Pakistan, Burma and Ceylon/West Coast United States and Canada Rate Agreement	Action of parties limited to discussion and agreement as to rates, charges, classifications and related tariff matters, with right of any party to change its own individually maintained and published tariff upon forty-eight (48) hours notice to the other parties. No specific voting provision.
9349	Portugal/United States Atlantic Rate Agreement	Action of parties limited to discussion and agreement as to rates, charges, classifications and related tariff matters, with right of any party to change its own individually maintained and published tariff upon forty-eight (48) hours notice to the other parties. No specific voting provision.
9369	Spain/United States Atlantic Rate Agreement	Action of parties limited to discussion and agreement as to rates, charges, classifications and related tariff matters, with right of any party to change its own individually maintained and published tariff upon forty-eight (48) hours notice to the other parties. No specific voting provision.

GALLAND, KHARASCH, CALKINS & LIPPMAN
ATTORNEYS AT LAW
1824 R Street, N. W.

March 23, 1965

Examiner John Marshall
Federal Maritime Commission
1321 H Street, N. W.
Washington, D. C.

Re: Docket 1095

Dear Examiner Marshall:

On March 3, 1965, the last day of hearing in Docket 1095, you ruled that Hearing Counsel could submit, as a late-filed exhibit in this proceeding, a document showing the voting requirements in approved conference agreements. In response to States Marine's objection to the receipt in evidence of a document that it had not seen, you stated that States Marine would be heard if it found any difficulty with the material presented in the exhibit (Tr. 1666). Subsequently, the exhibit was submitted and was received in evidence as Exhibit 93.

States Marine examined the exhibit, and, finding some differences between its understanding of conference voting requirements and the characterizations set forth in Exhibit 93 under the heading "Voting Requirements", requested its counsel to examine the approved conference agreements on file with the Federal Maritime Commission. The investigation disclosed several discrepancies between conference agreements and the notations of voting requirements set forth in Exhibit 93. The most recurrent discrepancy was the listing in Exhibit 93 of a percentage (i.e., majority, 2/3 vote, 3/4 vote) required "on all matters", whereas the conference agreement set forth the percentage as applicable to matters "within the scope of the Agreement", and was silent as to voting requirements for changes to the Agreement. The Far East Conference, to which States Marine belongs, falls in this category, and States Marine, upon making inquiry on this subject to the Far East Conference, was informed that counsel for the Far East Conference advised the Conference that the silence in the Agreement on the number of votes necessary to amend it means that the Agreement may be amended only upon unanimous vote. Other conference agreements do not contain the language "within the scope of the Agreement", but the voting provisions are related to specific items of conference business and are not by their terms applicable to amendments to the basic agreement.

While the parties may differ as to the effect of the various wordings in the agreements, the Exhibit should accurately reflect whether the voting percentage set forth is applicable by its terms to amendments, to matters "within the scope of this Agreement", or to other specified matters. Accordingly, States Marine has prepared, and is submitting herewith, a Correction Sheet to Exhibit 93, setting forth with more specificity the voting requirements of certain of the conference agreements listed in Exhibit 93. States Marine requests that the other parties be given an opportunity to examine the Correction Sheet, and, failing a showing of inaccuracy, that it be admitted into evidence as Exhibit 93-A.

Very truly yours,

Amy Scupi
Attorney for
States Marine Lines

cc: Roger McShea, Esq.
Charles Warren, Esq.

CORRECTION SHEET TO EXHIBIT 93VOTING REQUIREMENTS IN APPROVED CONFERENCE AGREEMENTS
WITH RATE MAKING AUTHORITY IN EFFECT AS OF MARCH 5, 1965

Substitute on Ex. 93 the following for the conferences listed below:

<u>Agreement Number</u>	<u>Name of Conference</u>	<u>Voting Requirements</u>
17	Far East Conference	Majority vote of conference membership on all matters within the scope of the agreement* except the selection of the chairman and fixing of duties may be by 2/3 vote.
59	River Plate and Brazil Conferences	2/3 vote of members entitled to vote on "ordinary routine business of the Conference, and upon any matter involving discriminations, tariffs, freights, commissions, brokerages, or other changes, or regulations governing southbound transportation"
90	Java ^x — New York Rate Agreement	Majority vote of membership on "rates of freight and conditions, including loading expenses" except 2/3 vote of majority for admission to membership.
5450	Brazil/United States — Canada Freight Conference	2/3 vote of membership entitled to vote on all matters within the scope of the agreement except that limitation of sailings (Article 8) and changes in the apportionment of conference expenses (Article 13) require unanimous vote of the conference membership.
5680	Pacific/Straits Conference	"Decisions must be arrived at by 2/3 vote of the membership."
6800	East Coast South America Reefer Conference . . .	2/3 vote of the membership on all matters within the scope of the agreement.
6900	River Plate — United States — Canada Freight Conference	2/3 vote of a quorum of the membership on all matters within the scope of the agreement except the establishment of contract rates.
7200	River Plate and Brazil/United States Reefer Conference	2/3 vote of a quorum of all members entitled to vote on all matters within the scope of agreement.

* Counsel for the Far East conference has interpreted this provision to require unanimous consent to amendments to the basic Conference agreement.

<u>Agreement Number</u>	<u>Name of Conference</u>	<u>Voting Requirements</u>
7630	Mid Brazil/United States — Canada Freight Conference	2/3 vote of a quorum of all members entitled to vote on all matters within the scope of the agreement, except admission to membership requires unanimous vote.
7640	North Brazil/United States — Canada Freight Conference	2/3 vote of a quorum of all members entitled to vote on all matters within the scope of the agreement, except admission to membership requires unanimous vote.
8090	Mediterranean/North Pacific Coast Freight Conference	Unanimous vote, less one, of a quorum of 3/4 of all members present at meeting and entitled to vote on all matters within the scope of the agreement.
8420	Israel/U.S. North Atlantic Ports Westbound Freight Conference	Decisions on all matters within the scope of the agreement determined as follows: Two (2) members — unanimous Three (3) members — 2/3 vote Four (4) or more members — 3/4 vote
8470	International Household Goods Rate Agreement	Majority vote of members on all matters within the scope of the agreement.

S E R V E D
MARCH 10, 1965
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

March 10, 1965

NO. 1095

AGREEMENT NO. 150-21, TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
AND AGREEMENT NO. 3103-17, JAPAN-ATLANTIC AND
GULF FREIGHT CONFERENCE

RECEIPT OF LATE-FILED EXHIBITS

In accordance with rulings rendered during the March 3, 1965 session of the hearing in this proceeding the following late-filed exhibits are received in evidence:

Exhibit No. 92

Memo Circular No. JAC 6/52, Tokyo, 2 April
1952

Exhibit No. 93

Statement of voting requirements in approved
conference agreements and in approved rate
agreements.

/s/ John Marshall
Presiding Examiner

(S E R V E D)
(MARCH 31, 1965)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 1095

AGREEMENT NO. 150-21, TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
AND
AGREEMENT NO. 3103-17, JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

DENIAL OF MOTION TO AMEND ORDER REOPENING PROCEEDING

This proceeding, reopened pursuant to a remand of the United States Court of Appeals, is an investigation to determine whether or not certain self-policing provisions in the Conference agreements of the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference are discriminatory, detrimental to the commerce of the United States, contrary to the public interest or otherwise in violation of the Shipping Act, 1916.

The respondent conferences have submitted a revised version of these provisions, and have petitioned the Commission for an order amending its amended order reopening this proceeding, so that these revised self-policing provisions may be made a part thereof.

States Marine Lines, a member of both respondent Conferences, and a protestant against the agreements under investigation has opposed the motion.

The record in this lengthy proceeding has been closed. An incorporation of the Conferences' latest modifications would require that record to be reopened, and new evidence heard. The result would unduly delay decision in an already protracted proceeding. Of course, there is nothing to preclude counsel for the Conference from setting forth in their briefs any proposals for modification of the contested clauses which alleviate the disputes between the parties.

Our decision in Docket 1095 will resolve the issues between States Marine and the Conferences as to what the Conferences' self-policing provisions may and should include and all proposals by counsel for the parties will be considered.

In view of the foregoing, respondents' motion to further amend the order reopening this proceeding herein is denied.

By the Commission.

/s/ Thomas Lisi
Secretary

(SEAL)

S E R V E D
APRIL 7, 1965
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

April 7, 1965

NO. 1095

AGREEMENT NO. 150-21, TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
AND AGREEMENT NO. 3103-17, JAPAN-ATLANTIC AND
GULF FREIGHT CONFERENCE

NOTICE OF STRIKING EXHIBIT

On March 10, 1965 a document submitted by Hearing Counsel, consisting of a statement of voting requirements in approved conference agreements and in approved rate agreements, was marked Exhibit No. 93 and received in evidence as late filed. Thereafter, counsel for States

Marine, by letter and "Correction Sheet to Exhibit 93" urged that there were several discrepancies between the conference agreements and the notations of voting requirements set forth in Exhibit No. 93. Conference counsel, by letter reply, objects inter alia to the characterizations of voting requirements as stated in the correction sheet and transmittal letter. Hearing Counsel, by memorandum, objects to several items on the correction sheet as well as the argumentative nature of the transmittal letter.

The stated purpose of Exhibit No. 93 was to note, without comment or interpretation, the substance of the voting requirements provisions contained in approved and currently effective (March 5, 1965) conference and rate agreements on file with the Commission's Bureau of Foreign Regulation. In view of the disagreement which has developed between the parties regarding the contents of this exhibit, and the alleged corrections which should or should not be made, it is apparent that the simplest and best means of clearing the record of the resulting confusion and uncertainty will be to strike the exhibit.

Therefore, Exhibit No. 93 is hereby stricken and the said correction sheet and transmittal letter are denied receipt in evidence. The Examiner will take official notice of the agreements concerned, as contained in the files of the Commission's Bureau of Foreign Regulation, and all parties may do likewise.

/s/ John Marshall
Presiding Examiner

BEFORE THE
FEDERAL MARITIME COMMISSION

[Dated May 3, 1965]

Docket No. 1095

AGREEMENT NO. 150-21, TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN AND AGREEMENT NO. 3103-17, JAPAN-ATLANTIC
& GULF FREIGHT CONFERENCE

Opening Brief of Respondents, Trans-Pacific Freight Conference of
Japan and Japan-Atlantic & Gulf Freight Conference, and Their
Member Lines.

* * * * *

IV.

DUE PROCESS OF LAW

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Nor will the courts entertain the assertion of a denial of due process unless they are faced with an actual deprivation. The Supreme Court has so ruled:

"Due process of law . . . formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. *Asserted denial is to be tested by an appraisal of the totality of facts in a given case.* That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. *In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.*" (Emphasis added) *Betts v. Brady*, 316 U.S. 455, 462 (1941).

* * * * *

BEFORE THE
FEDERAL MARITIME COMMISSION

[Dated May 24, 1965]

In the Matter of:

Agreement No. 150-21, Trans-Pacific
Freight Conference of Japan and
Agreement No. 3103-17, Japan-
Atlantic and Gulf Freight Conference

Docket No. 1095

REPLY BRIEF OF
STATES MARINE LINES

A. Foreword

The dictates of fairness force us to an opening concession: among the cases cited in the Conference brief are several fringe precedents which have not been reversed or overruled and which do not hurt the Conferences more than they help. The detection of this microscopic body of law presents an intellectual challenge which we recommend for after-hours diversion. Any number can play and the rules are simple.¹

¹ The first player to discover a cited case which is still good law is declared the winner and receives a prize — which should be costly to keep it in dignified relation to the victor's high achievement. Example: A player might score by discovering State ex. rel. Mayfield v. St. Louis Medical Society, 91 Mo. App. 76 (1901), described at page 49 of the Conference brief as "frequently cited." Checking this characterization, he would find that it has been cited by courts precisely zero times in its 64 years of archival desuetude. Nonjudicially, it was cited seven times by an enthusiastic annotator in 20 ALR 2d and once in a compendium in 76 Harv. Law Rev. at 1034. A suitable award for sighting this historic legal beacon would be a recently-superseded set of Shepard's Citations (Missouri ed.)

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C. Due Process Cases — Conference Citations

1. Betts v. Brady, 316 U.S. 455 (1941).

The Conferences cite this case (pp. 34-35) to prove, we gather, that the requirements of due process are not only flexible but fairly meaningless. The ruling in *Betts* was that appointment of counsel for an indigent defendant in a state prosecution was not a requirement of due process. The case was overruled in 1963 with unprecedented fanfare, in *Gideon v. Wainwright*, 372 U.S. 335, 342-44. The event was recorded for the lay public in *Gideon's Trumpet* by Anthony Lewis (Random House, 1964) — a nonfiction best seller over many months — and is commonly ranked among the leading constitutional developments of this generation. The citation of *Betts* as a representation of the current state of the law of due process stamps the whole of the Conference brief as a gigantic anachronism and a cynical hoax on the Commission.

In overruling *Betts*, the Supreme Court said in *Gideon* (272 U.S. at 344):

"The fact is that in deciding as it did — that 'appointment of counsel is not a fundamental right, essential to a fair trial' — the Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice."

* * * * *

E. Neutrality — Conference Citations

1. Avery Again

The *Avery* decision, discussed above (pp. 7-8), is quoted at page 49 of the Conference brief to the effect that a disciplinary edict of the Curb Exchange will not be set aside "solely because the charges are preferred by a member of the governing board which is to try the case." *Avery* was decided in 1945 — long before *Silver*, and seems irreconcilable with the

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Silver ruling. It was in any event never a compelling authority, being not an appellate decision but that of a single trial judge in a state court. It differed on its facts from this case in that (a) *Avery* involved no sanction of a government agency as did *Silver* or as does this proceeding; and (b) the committee which preferred charges was not the sole deciding authority (which a neutral body *would* be) but accounted for only five members of a 21-man board of governors which heard the case. Even so, the court while upholding the Exchange, expressed deep misgivings:

"The participation in the trial of Governors who were also members of the Committee on Stock Transactions which preferred the charges has given the court deep concern. . . . But this practice, although it goes against the grain, is not unlawful, particularly where the Constitution of the Exchange, to which its members and their firms have subscribed permits it (55 N.Y.S.2d at 222).

* * *

"So far as voluntary associations, such as the Curb Exchange, are concerned the court is not at all impressed with the wisdom of permitting dual participation or of its necessity; but certainly in the light of the specific provision of the Constitution of the Exchange on the subject, the practice cannot be held to be unlawful." (55 N.Y.S.2d at 223).

2. *State ex. rel. Mayfield v. St Louis Medical Society*,
91 Mo. App. 76 (1901).

This decision was one of the two great events of 1901, the other being the death of Queen Victoria. The Conferences tout the case (p. 49) as "frequently cited" — a claim discussed in note 1, above. The conference summary enjoys the distinction of accuracy, but the case is of slight help to the Conferences cause. It refused to restore a doctor to a medical society from which he had been expelled by an ethics committee whose members were on the medical staff of an institution in competition with the plaintiff's establishment. The court held that this relationship was not disqualifying.

States Marine makes no claim of immunity to trial by competitors (as under Article 10 of the Conference agreements). It does object to trial by an *accuser* or by a judge in the hire of an accuser. *Mayfield* does not touch that issue.

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(Served - FMC - August 5, 1965)

Agreement No. 150-21 as modified by No. 150-29, and Agreement No. 3103-17 as modified by No. 3103-26, approved pursuant to section 15, Shipping Act, 1916.

Section 15 does not require that modifications to conference basic Agreements be adopted by unanimous vote of the parties.

Charles F. Warren and John P. Meade for respondents Trans-Pacific Freight Conference of Japan and Japan-Atlantic & Gulf Freight Conference, and their member lines.

George F. Galland and Amy Scupi for protestant States Marine Lines.
Roger A. McShea, III and Robert J. Blackwell, Hearing Counsel.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER^{1/}

By order of April 2, 1964, the Commission,^{2/} acting pursuant to section 25 of the Shipping Act, 1916 (the Act), and its Rule 16(a), withdrew and vacated its Report and Order herein, served October 30, 1963, and reopened this proceeding for the purpose of entering upon an investigation and hearing to determine whether Articles 10, 12 and 25 as proposed to be modified by Agreement No. 150-21 and 3103-17 are unjustly discriminatory or unfair, detrimental to the commerce of the United States, contrary to the public interest, or violative of the Act, and whether they should be approved, disapproved or modified pursuant to section 15 of the Act.^{3/}

^{1/} This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission (Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224, 502.228).

^{2/} As used herein, the term "Commission" includes all predecessor agencies.

^{3/} Section 15 provides in part: "The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers . . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations." (Continued on next page)

Thereafter, by orders served May 15, 1964 and November 19, 1964, the Commission granted motions of States Marine Lines to expand the issues to provide a general inquiry into "all pertinent aspects of the neutral body system of the respondent conferences . . .", including (1) the investigation of Articles 10, 12 and 25 of Agreements Nos. 150 and 3103 "as they now stand approved" as well as proposed to be modified and (2) the determination of "whether or not Section 15 of the Act requires that modifications to agreements approved thereunder be adopted only upon unanimous vote of the parties to such approved agreement." Except for differences not relevant here, both basic agreements and the proposed modifications thereto are identical in their terms and for the purposes of this decision need not be treated separately. The self-policing systems of both conferences are provided for in Article 10 "Breach of Agreement", Article 12 "Faithful Performance", and Article 25 "Neutral Body". (For the full texts of these articles as presently approved see Appendix A hereto).

Just before the conclusion of the hearings, conference counsel sought to introduce further modifications to Articles 10 and 25, which he represented as being responsive to a number of States Marine's objections. These modifications, adopted by the conferences over States Marine's objection, had been filed with the Commission earlier and given the designations Agreement No. 150-29 and Agreement No. 3103-26. Hearing Counsel favored and States Marine opposed their admission. The Examiner ruled that they went beyond the scope of the Commission's orders of investigation regarding the approvability of the agreements but admitted them solely for the purpose of showing "States Marine's motivation". The record was then closed and briefing dates were set.

3/ (Continued) As amended by Public Law 87-346, 75 Stat. 762, October 3, 1961, section 15 further provides:

"The Commission shall disapprove any such agreement . . . on a finding of inadequate policing of the obligations under it . . ."

Conference counsel thereafter moved the Commission to clarify or amend its orders so as to include the new modifications. States Marine opposed the motion. The Commission, by order served March 31, 1965, denied the motion but with the reservation that:

"Of course, there is nothing to preclude counsel for the conference from setting forth in their briefs any proposals for modification of the contested clauses which alleviate the dispute between the parties.

"Our decision in Docket 1095 will resolve the issues between States Marine and the conferences as to what the conferences' self-policing provisions may and should include and all proposals by counsel for the parties will be considered."

The Examiner understands the Commission's statement to constitute assurance to respondent conferences that any proposals for modification of contested provisions which alleviate the disputes between the parties will be considered. Conference counsel, on brief, has referred to each of these later modifications and they will accordingly be considered in this initial decision.^{4/} (For the full texts of Articles 10, 12 and 25, as first modified by proposed agreements 150-21 and 3103-17 and thereafter by proposed agreements 150-29 and 3103-26, see Appendix B).

THE FACTS

This proceeding involves a prolonged and sometimes heated dispute between the two respondent conferences and protestant States Marine Lines (States Marine). Trans-Pacific Freight Conference of Japan (Trans-Pacific) has 20 member lines^{5/} and serves the trade from Japan, Korea and Okinawa to United States and Canadian Pacific Coast ports, including Alaska and Hawaii. Japan-Atlantic & Gulf Freight Conference (Japan-Atlantic) has 15 member lines and serves the trade from Japan, Korea and Okinawa to Atlantic and Gulf ports of North America. Both

^{4/} Neither States Marine or Hearing Counsel have indicated any objection to the Commission's stated reservation or to the conferences' references on brief to these subsequent modifications.

^{5/} See Approved Steamship Conference and Related Agreements, Federal Maritime Commission, September 1, 1964.

conferences are domiciled in Japan. Dual rate systems for both have been conditionally approved by the Commission but neither is in operation at present.

During most of the 1950's competition in these trades was extreme and malpractices were commonplace. Each had extended histories of instability. In fact the inbound trades from Japan are normally more competitive, unstable, and susceptible to malpractices than are the companion outbound trades. Effective self-policing is, therefore, more necessary and more difficult.

In March of 1958 Trans-Pacific held a meeting in Hakone, Japan and decided to initiate a neutral body self-policing system to investigate complaints against member lines alleging malpractices and to assess fines therefor. Article 25 of the conference's basic agreement was drafted for this purpose. Since then, these trades have been relatively stable and malpractices have decreased. Nonetheless, they remain potentially volatile.

Trans-Pacific initially retained a British chartered firm of international accountants, Lowe, Bingham & Thomsons (Lowe), to serve as the Neutral Body. States Marine subscribed to the conference's agreement with Lowe. On January 13, 1959, Lowe representatives visited States Marine's Tokyo office to investigate a complaint alleging that States Marine had granted Japanese mandarin orange shippers free passage from San Francisco to Japan. Evidence of such a request was found but there was no indicate of whether it had been honored. Lowe thereupon directed its New York correspondent firm, Price, Waterhouse & Co. (Price), to examine States Marine's New York records.

States Marine first agreed to an examination by Price but the next day advised that it would interfere with its annual audit then in process and that it would rather have its own auditors, Peat, Marwick, Mitchell & Co. (Peat) conduct the examination under Price's instructions and report their findings to Price. It was stated on behalf of States Marine that there was no reluctance to having the work done and that they were not adopting a contrary attitude, but simply felt that their own public

accountants could do the job as well as Price. When this proposal was rejected by Lowe, States Marine denied Lowe and Price access to its records. Lowe then assessed a fine of \$10,000 against States Marine for such denial, a breach of the Agreement under Article 25. Approximately three months later, States Marine informed the conference that it understood Lowe and Price were employed as accountants by at least one member line and that under the terms of the Neutral Body agreement they were disqualified. On November 7, 1960, States Marine filed a complaint with the Commission against Trans-Pacific in Docket 920, States Marine Lines, Inc. v. Trans-Pacific Freight Conference, 7 F.M.C. 204 (1962).

In February 1961, while the complaint was pending decision, Price again sought access to States Marine's New York files for the purpose of investigating the mandarin orange trade during the 1960 season. States Marine again refused, Lowe levied a \$15,000 fine, and States Marine filed a second complaint with the Commission in Docket 920-1, captioned as above.

Thereafter, the Commission issued a cease and desist order directing the conference to desist from levying fines, and from collecting the fines already assessed against States Marine, until final disposition of the proceeding.^{6/} Two months later, in April 1961, Lowe representatives visited States Marine's Tokyo office and asked that Isthmian Lines, Inc., a member of Trans-Pacific and wholly-owned subsidiary of States Marine, grant them access to all Isthmian documents relative to the mandarin orange trade for a given season. Isthmian, referring to the pendency of the proceedings in Docket 920, refused, was fined \$10,000, and filed a complaint with the Commission.

^{6/} This order was eventually invalidated on technical grounds, 302 F. 2d 875, 878 (April 12, 1962).

In its Report and Order in Docket 920 and 920-1 the Commission found that Lowe's appointment violated the neutrality requirements of the conference agreement, and that a subsequent conference resolution deleting these requirements was a "modification" of the agreement, illegal because never approved by the Commission. The conference was ordered to cancel the above noted fines; to cease and desist from attempting to collect these or any other fines assessed by Lowe in any manner: and from carrying out the conference agreement in any manner inconsistent with modifications as approved by the Commission or "the Commission's Report in these proceedings".

On appeal by Trans-Pacific the Ninth Circuit upheld the Commission. Trans-Pacific Freight Conference of Japan v. F.M.C. 314 Fed. 2d 928 (CA 9th, 1963) affd. on reconsideration, _____ F. 2d _____ February 26, 1964. Both the Commission and the Court, while not providing a conclusion as to whether a neutral body could be lawfully affiliated with a conference member, held that Trans-Pacific had not provided in its original "Neutral Body" system or approved modifications for a neutral body which could be so affiliated and therefore that the conference had operated contrary to the language of their approved agreement and thus in violation of section 15 of the Act.

Following this finding both Trans-Pacific and Japan-Atlantic, the latter having retained Lowe under an identical "Neutral Body" system, were sued by the Department of Justice for statutory penalties. The Trans-Pacific suit was settled for \$25,000 but, although States Marine contended that it had opposed the violations, the conference minutes did not reflect the votes by individual lines and it was held liable and required to contribute because it was a member of the conference. Proof of its votes might or might not have precluded assessment of a contribution.

Before the Commission issued its decision in Docket 920, Trans-Pacific and Japan-Atlantic, respectively, filed modifications 150-21 and 3103-17 (See Appendix B). These provided that a neutral body must

disclose its affiliations with any member line, but that such affiliation will not disqualify the neutral body from serving unless it is with an accused line, in which event the neutral body must appoint an unaffiliated agent to conduct the investigation. States Marine opposed the adoption of these modifications by the conferences and filed a Protest of Approval with the Commission. Thereupon the Commission instituted the investigation in Docket No. 1095 and set the case down for decision on memoranda and oral argument. On October 30, 1963, the Commission adopted its Report and Order approving the modifications and making the determination that section 15 of the Act standing alone does not require unanimity of voting by conference members to modify conference agreements.

On November 9, 1963 States Marine appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit in States Marine Lines, Inc. v. Federal Maritime Commission, No. 18,227. In its brief, filed with the Court January 23, 1964, States Marine placed heavy reliance on a recent Supreme Court decision in Silver v. New York Stock Exchange, 373 U.S. 341 (May 20, 1963).^{7/} Silver was decided after the Commission heard oral argument in Docket 1095 (May 1, 1963) and was not cited to nor considered by the Commission. The Commission accordingly filed a Motion to Remand in No. 18,227 stating that it desired "to reopen and reconsider this case in light of Silver and to conduct such further proceedings as it deems appropriate." It further provided "Upon the Court's remand, the Commission will vacate the existing Report and Order and . . . afford the parties . . . full opportunity to offer evidence and argument in the reopened proceeding", and urged that "petitioners cannot be prejudiced by a reconsideration of Docket 1095 which takes into account

^{7/} See Respondent's Motion to Remand at p. 2, *supra*.

the principal legal precedent they are urging before this Court." The Court granted the Commission's Motion to remand, which was unopposed,^{8/} and the Commission withdrew and vacated its Report and Order and reopened this proceeding.

DISCUSSION AND CONCLUSIONS

In Silver the question was whether the New York Stock Exchange should be held liable to a nonmember broker-dealer in a treble-damage action under the antitrust laws or regarded as impliedly immune therefrom^{9/} when, pursuant to rules the Exchange had adopted under the Securities Exchange Act of 1934, it ordered a number of its members to remove private direct telephone wire connections previously in operation between their offices and those of the nonmember, without giving the nonmember notice, assigning him any reason for the action, or affording him an opportunity to be heard.^{10/} Silver, a dealer in over-the-counter securities and municipal bonds, with offices in Dallas, Texas, had attempted by letters, telephone calls and even a trip to New York to get an explanation from the Exchange revealing the reasons for its action but was merely told that it was the policy of the Exchange not to disclose its reasons.

The Court held that the Securities Exchange Act affords no justification for anticompetitive collective action taken without according "fair procedures"; that Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and

^{8/} Respondent conferences were not parties in this court litigation and therefore did not reply to the motion.

^{9/} Section 15 of the Shipping Act, 1916, provides that agreements approved by the Commission shall be excepted from the provisions of the anti-trust laws. The Securities Exchange Act contains no like provision.

^{10/} Stock ticker service furnished Silver directly from the floor of the Exchange was also discontinued without stated reason.

disclose its affiliations with any member line, but that such affiliation will not disqualify the neutral body from serving unless it is with an accused line, in which event the neutral body must appoint an unaffiliated agent to conduct the investigation. States Marine opposed the adoption of these modifications by the conferences and filed a Protest of Approval with the Commission. Thereupon the Commission instituted the investigation in Docket No. 1095 and set the case down for decision on memoranda and oral argument. On October 30, 1963, the Commission adopted its Report and Order approving the modifications and making the determination that section 15 of the Act standing alone does not require unanimity of voting by conference members to modify conference agreements.

On November 9, 1963 States Marine appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit in States Marine Lines, Inc. v. Federal Maritime Commission, No. 18,227. In its brief, filed with the Court January 23, 1964, States Marine placed heavy reliance on a recent Supreme Court decision in Silver v. New York Stock Exchange, 373 U.S. 341 (May 20, 1963).^{7/} Silver was decided after the Commission heard oral argument in Docket 1095 (May 1, 1963) and was not cited to nor considered by the Commission. The Commission accordingly filed a Motion to Remand in No. 18,227 stating that it desired "to reopen and reconsider this case in light of Silver and to conduct such further proceedings as it deems appropriate." It further provided "Upon the Court's remand, the Commission will vacate the existing Report and Order and . . . afford the parties . . . full opportunity to offer evidence and argument in the reopened proceeding", and urged that "petitioners cannot be prejudiced by a reconsideration of Docket 1095 which takes into account

^{7/} See Respondent's Motion to Remand at p. 2, *supra*.

the principal legal precedent they are urging before this Court." The Court granted the Commission's Motion to remand, which was unopposed,^{8/} and the Commission withdrew and vacated its Report and Order and reopened this proceeding.

DISCUSSION AND CONCLUSIONS

In Silver the question was whether the New York Stock Exchange should be held liable to a nonmember broker-dealer in a treble-damage action under the antitrust laws or regarded as impliedly immune therefrom^{9/} when, pursuant to rules the Exchange had adopted under the Securities Exchange Act of 1934, it ordered a number of its members to remove private direct telephone wire connections previously in operation between their offices and those of the nonmember, without giving the nonmember notice, assigning him any reason for the action, or affording him an opportunity to be heard.^{10/} Silver, a dealer in over-the-counter securities and municipal bonds, with offices in Dallas, Texas, had attempted by letters, telephone calls and even a trip to New York to get an explanation from the Exchange revealing the reasons for its action but was merely told that it was the policy of the Exchange not to disclose its reasons.

The Court held that the Securities Exchange Act affords no justification for anticompetitive collective action taken without according "fair procedures"; that Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and

^{8/} Respondent conferences were not parties in this court litigation and therefore did not reply to the motion.

^{9/} Section 15 of the Shipping Act, 1916, provides that agreements approved by the Commission shall be excepted from the provisions of the anti-trust laws. The Securities Exchange Act contains no like provision.

^{10/} Stock ticker service furnished Silver directly from the floor of the Exchange was also discontinued without stated reason.

protected self-regulation activity when carried out in a "fundamentally unfair manner"; that the Exchange in failing to respond to Silver's request for notice and to afford him an opportunity for hearing had plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore was not justified in doing what would otherwise be an antitrust violation. The meanings of the key terms "fair procedures", "fundamentally unfair manner" and "notice and . . . an opportunity for hearing", as here used by the Court, are made clear by its finding that the act of self-regulation was not justified because the collective refusal to continue the private wires occurred under totally unjustifiable circumstances, i. e. that notwithstanding Silver's prompt and repeated requests, he was not informed of the charges underlying the decision to invoke the Exchange rules and "was not afforded an appropriate opportunity to explain or refute the charges". Mr. Justice Goldberg, speaking for the majority, emphasized that "no justification can be offered for self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position." 373 U.S. at 361. In footnote 17 at 364 the Court noted:

"The basic nature of the rights which we hold to be required under the antitrust laws in the light of today's decision is indicated by the fact that public agencies, labor unions, clubs, and other associations have, under various legal principles, all been required to afford notice, a hearing, and an opportunity to answer charges to one who is about to be denied a valuable right.

/citations/."

States Marine, relying on Silver and the Fourth, Fifth, Sixth and Eighth Amendments of the Constitution, contends that the conferences' proposed provisions for self-policing do not incorporate necessary due process safeguards. It advocates specific revisions regarding notice,

identification of accuser, investigation and hearing, notice of acquittal, criteria for fines, neutrality of neutral bodies, and right to appeal.^{11/}

The cited amendments of the Constitution involve restrictions on the power of government^{12/} and are primarily concerned with criminal proceedings rather than nongovernmental self-policing actions by a voluntary association applicable to its members only. Moreover, Silver is distinguishable from the instant proceeding on a number of legal and factual grounds . . . it was an antitrust case, this is not; States Marine is a member of both respondent conferences, Silver was not a member of the Exchange; the Shipping Act specifically excepts agreements approved thereunder from the antitrust laws, the Securities Exchange Act does not; the problems and considerations having to do with stock exchange self-regulation differ materially from those having to do with steamship conference self-regulation; notice and hearing, the only two specific "safeguards" in issue in Silver, are expressly provided for under the conferences' proposed systems; and States Marine chose to join the conferences thereby surrendering some sovereignty. Silver exercised no choice involving surrender. In considering the true freedom of the choice available to States Marine, one must bear in mind that it may not, as a practical matter, be able to operate outside the conferences in the inbound trades from Japan when and if their dual rate systems go into effect. Nonconference lines will then be precluded from carrying cargoes for shippers that sign conference dual rate contracts.

^{11/} These revisions have been considered by the conferences and, except as hereinafter indicated, rejected.

^{12/} Fourth Amendment: Unreasonable search and seizure, Fifth Amendment: Deprivation of life, liberty, or property, without due process of law, Sixth Amendment: Right to speedy and public trial, by impartial jury; to be informed of the nature and cause of the accusation; to be confronted with prosecution witnesses; and to have the assistance of defense counsel, and Eighth Amendment: Excessive bail, fines, and cruel and unusual punishments.

The term "due process" is not to be found in the body of the majority opinion in *Silver*.^{13/} Nevertheless the case is persuasive. It clearly supports a requirement for "fundamental fairness" in industrial self-policing systems, but not for the so called defensive safeguards and techniques historically identified with constitutional due process of law.

The Right to Notice

The significance of States Marine's due process philosophy is evident from its proposed revisions of Agreements 150-21 and 3103-17. The Agreements, as proposed by the conferences (Appendix B hereto), provide, in substance, that upon receipt of a complaint the Neutral Body would have authority to call upon the member named therein and, without prior notice, inspect records, correspondence, and other documents and materials deemed by the Neutral Body to be relevant. There is provision for notice and hearing upon completion of the investigation but before final decision. States Marine would require that the Neutral Body, before undertaking an investigation, furnish the accused a copy of the complaint, setting forth facts in sufficient detail to reveal the specific violation charged, and thereafter allow a period of thirty days for reply. Records considered "reasonably relevant" would be made available for examination. States Marine witness Carpenter^{14/} contended that this proceeding followed the requirements set forth in *Silver* for notice of the charges. The conferences contend, correctly, that any notice to a member suspected of a malpractice, before the surprise investigation, would facilitate the concealment, disposal, and/or falsification of records.

^{13/} There is reference to "due process" in the dissenting opinion of Mr. Justice Steward and Mr. Justice Harlan but for the purpose of urging that adherence to due process concepts of notice, confrontation, and hearing could frustrate the purpose and policy of the Securities Exchange Act, and bear no relevance to the purpose and policy of the antitrust laws.

^{14/} John Tilney Carpenter, States Marine's Chief legal officer.

Conference witness McCone^{15/} urged that surprise visitation and unhampered access to records are necessary to an effective self-policing system, particularly as a deterrent to malpractices. He noted that Lowe, as neutral body, had assessed fines against Pacific Far East Line as well as States Marine, Isthmian and certain foreign flag lines. Conference witness Waldroup^{16/} expressed the opinion that it would be "naive" to expect the accused to produce incriminating records if told in advance what shipments were involved and what records were required. Hearing Counsel take the position that surprise visitation is an absolute necessity for successful self-policing in these trades and that prior notice would be "contrary to the public interest". Conference witness Cocke^{17/} was a little more abrupt in stating "the guts of the thing is . . . access to the records." States Marine's contention that Silver requires notice and an opportunity to reply before investigation by the Neutral Body is not well founded. As previously noted, the actual finding in that case was not the Exchange should have given Silver notice of the charges and an opportunity to be heard before it issued the order compelling its members to remove the direct lines.^{18/} He was forced out of business without notice as to the reason and was not afforded an opportunity to explain or refute. To conduct an initial investigation without notice is quite a different matter. A requirement for notice of the specific charge prior to investigation would, as urged by the conferences, defeat the inquiry and allow an accused to defend itself by hiding records. Article 25(f)(3), as modified (see Appendix B), provides for notice and hearing before final decision and to that extent is clearly in keeping with the standards of fairness prescribed by Silver.

^{15/} James T. McCone, Traffic Manager, Pacific Far East Line.

^{16/} John D. Waldroup, Resident Partner of Arthur Young & Company in its Tokyo office.

^{17/} Alex C. Cocke, Vice President, Lykes Bros. Steamship Company, Inc.

^{18/} The Exchange's constitution guarantees notice and hearing to its members but not to non-members.

The Right to Confrontation

States Marine contends that the copy of the complaint, which it feels should be promptly furnished an accused line, should identify the complainant in order that motivations may be tested and a determination made of whether the action is brought "out of spite", or "is based in fact or on bias, or competitive reasons or any other reasons". Relying on Greene v. McElroy 360 U.S. 474 (1959), States Marine urges that the right to confront and cross examine an accuser is a basic protection available to the accused even in regulatory matters. In Greene the issues concerned security clearance revocation procedures followed by the Department of Defense. The action complained of was by a government agency which utilized procedures unauthorized by the President or Congress to deprive petitioner of the right to follow his chosen profession.^{19/} The self-policing system of these conferences constitutes a procedure, adopted by at least a two-thirds majority vote, for the investigation of complaints and the assessment of fines (called liquidated damages) against voluntary member lines found to have breached the conference agreement, tariff rates, or rules and regulations involving malpractices. It is a system required by law and designed to mutually benefit all of the lines by the elimination of malpractices. Greene is not in point.^{20/}

The conferences and Hearing Counsel take the position, clearly supported by the record, that if the Neutral Body is required to disclose the name of the complainant there will be few if any complaints.^{21/}

^{19/} Greene, an aeronautical engineer, was employed as general manager of a private engineering and research corporation.

^{20/} Nor is Greene v. U.S., 376 U.S. 149 (1964), a subsequent case wherein the same plaintiff sought damages for the revocation of his security clearance; or Pointer v. Texas, No. 577, Decided April 5, 1965, 33 LW 4306, a criminal prosecution for robbery; or Douglas v. Alabama, No. 313, Decided April 5, 1965, 33 LW 4304, a criminal proceeding for assault with intent to murder.

^{21/} States Marine is an exception, contending that it has no objection to making complaints openly.

When asked whether Lykes would file any complaints if the identity of the accuser were revealed, Cocke stated "I don't think we would. It all depends on the circumstances, but I doubt whether we would or not, because we would feel that it would materially hurt us in the trade." He further testified that notice prior to visitation should not be required "Because it gives the accused too much time to you might say counter-act the evidence in the documents, and what have you." McCone stated that by filing a complaint a line runs the risk of alienating shippers. "You cannot go around breaking shippers rice bowls and get away with it. It puts you in an impossible position."

Waldroup of the present Neutral Body firm testified that findings of malpractices are always supported by documentary evidence which is usually found "somewhere in the documents" in the possession of the accused.^{22/} An exception occurs in instances where records are maintained by an employee without the knowledge of the employer. This and other information obtained in confidence is considered by the Neutral Body but the effort is to use it as a lead to documentary information in the records of the accused rather than as the primary basis for findings. In general the conference witnesses urge that it is not a question of the identity of the complainant or the source of confidential information; that it is strictly a question of facts. Do the facts . . . substantial, probative facts . . . support a finding of breach?

Hearing Counsel and the conferences differ in that Hearing Counsel contends that the Neutral Body should be required to show the accused all of the evidence it relies upon as proof of a breach; that evidence not disclosed must be disregarded; and that if the evidence is in such form

^{22/} These consist of the entire range of records used by a steamship line in the conduct of its business, including books of account, memoranda, correspondence, manifests, waybills and bills of lading.

as to disclose the identity of the complainant, that portion should be masked out.^{23/}

There can be no doubt that a requirement necessitating the disclosure of (1) the identity of the complainant and (2) information received in confidence, in such form as to reveal its source, would seriously cripple the Neutral Body system and therefore be "contrary to the public interest."

The latest modification of Article 25(f)(3) proposed by the conferences provides in part:

"After the Neutral Body has completed its investigation, it shall advise the respondent either that a breach has not been found or that there are reasonable grounds to believe that a breach occurred. In the latter event, the respondent will be informed at this time of the nature of the alleged breach, and the evidence concerning it which the Neutral Body in its absolute discretion is able to disclose. In so advising the respondent, the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information. In all cases, however, the Neutral Body will inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fair play. Within fifteen (15) days, or within such reasonable time thereafter as the Neutral Body may in its sole discretion grant, if the respondent so requests, it may meet with the Neutral Body, with or without its own

^{23/} On Reply Brief (p. 29, 42, 43 and 53) conference counsel appears to take the position that Hearing Counsels' concern in this regard has been obviated by the latest modifications which are said to provide that evidence not shown to an accused will not be made the basis of findings. This may be the intent but a careful reading of the latest version of Article 25(f)(3) does not bear it out.

accountant and/or attorney, and offer to the Neutral Body such explanations and/or rebutting evidence as it may deem proper and desirable. At such hearing, the Neutral Body shall consider all of the available evidence and make its decision in accordance with the standards set forth under Article 25(f)(2) hereof."

The record offers no suggestion as to a realistically possible situation in which this provision could conceivably fail to satisfy the most demanding requirements of Silver. In any event, a rigid requirement that all evidence relied upon be shown to an accused in its original form, even with provision for masking out portions, would unnecessarily hazard the disclosure of the identity of complainants and sources of confidential information. Oral statements have never been relied upon by Neutral Bodies of these conferences without documentary support, the substance of which has been made known to the accused. The Neutral Body must, as a minimum, inform the respondent of the nature of the alleged breach, "bearing in mind basic precepts of fair play". In those instances where evidence relied upon for decision should not be shown to the accused in its original form because of undesired disclosures, it would certainly be within the "basic precepts of fair play" for the Neutral Body to go as far as it reasonably can, without disclosing the identity of complainants or sources of confidential information, to inform the accused of the substance thereof as material to an adequate understanding of the charges and findings. The substance of the evidence relied upon in reaching a finding that a breach has been committed must be disclosed to the accused in sufficient detail to give him an opportunity to show that it is untrue. If the Neutral Body should fail to comply with the provisions of this Article, including the stated requirement for "fair play", the respondent line may seek relief from the Commission and the Courts. To this time, however, no line, including States Marine, has complained to any of these Neutral Bodies about a lack of specificity of notice.

In Willner v. Committee on Character, 373 U.S. 96, 107-8 (May 13, 1963) a recent case involving governmental action, and therefore rightly concerned with Constitutional due process, Mr. Justice Goldberg, concurring, said:

"As I understand the opinion of the Court, this does not mean that in every case confrontation and cross-examination are automatically required . . . The circumstances will determine the necessary limits and incidents implicit in the concept of a 'fair' hearing. Thus, for example, when the derogatory matter appears from information supplied or confirmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant, and it is plain and uncontradicted that the committee's recommendation against admission is predicated thereon and reasonably supported thereby, then neither the committee's informal procedures, its ultimate recommendations, nor a court ruling sustaining the committee's conclusion may be properly challenged on due process grounds, provided the applicant has been informed of the factual basis of the conclusion and has been afforded an adequate opportunity to reply or explain. Of course, if the denial depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded".

Fair play requires, and Article 25(f)(3) anticipates, that the accused will be informed of the factual basis of the Neutral Bodies' conclusions and will be afforded an adequate opportunity to reply or explain.

Investigation and Hearing

Under the heading of Fair Investigation and Hearing, States Marine proposes the following provisions regarding authority of the Neutral Body, and procedural requirements and limitations:

"(e)^{24/} Authority of Neutral Body. The Neutral Body shall be authorized:

(4) To examine all records reasonably relevant to any investigation and to demand that such records be made available for examination by any member line; provided, however, that as to any accounts or financial records located in the United States, of a member line under investigation (or records of agents of such line), the member line may request that the examination be made, under the Neutral Body's direction, by auditors selected by such member line. (The auditors so designated may be the member line's regular outside auditors). Such auditors shall be approved by the Neutral Body (which shall not withhold approval unreasonably) and shall report their findings to the Neutral Body in such manner as the Neutral Body may require. A request for the use of outside auditors designated by the line under investigation shall be filed with the Neutral Body within 10 days after the Neutral Body's demand for investigation of financial records or accounts to which this paragraph applies.

(5) To hold hearings."

* * *

"(f) Procedural Requirements and Limitations. When a complaint is filed with it, the Neutral Body shall:

(1) Promptly furnish a copy of the complaint, if written, or a written summary, if oral, to the accused line, identifying the complainant and the specific transactions to which the complaint relates.

(2) Afford the accused line an opportunity to reply within 30 days after service of the complaint.

^{24/} The numbering system employed by States Marine is unrelated to that of the conferences.

(3) Conduct such preliminary investigation as it deems appropriate.

(4) After preliminary investigation (including consideration of the accused line's reply), dismiss the complaint, or set it for hearing, with written notice in either event to the conference and the accused line.

(5) If a hearing is held, it shall be at a time and place reasonably convenient to the parties, and not sonner than 30 days after notice to the accused line.

(6) The order of proof shall be as follows:

- (i) Evidence against the accused line.
- (ii) Evidence on behalf of the accused line.
- (iii) Rebuttal.

The Neutral Body and the accused line may be represented by attorneys or other persons of their own selection. A transcript of the evidence shall be taken, which any party shall be free to inspect and to purchase at reasonable rates; and all exhibits shall be filed and made available to the parties. Witnesses shall be subject to cross-examination. Legal rules of evidence need not be followed but proof must be credible and reasonably related to and probative of the charge under investigation."

Carpenter testified that the use of a line's own auditors would be a matter of convenience and would avoid exposing its confidential business affairs. He relied extensively on Silver in urging the revised procedural requirements and limitations. States Marine witness Boyarsky^{25/} saw no difficulty in a line's auditors working under the direction of the Neutral Body and thought that such auditors could provide a useful service because of their familiarity with the line's

^{25/} Max Boyarsky, a Certified Public Accountant and member of the American Institute of Certified Public Accountants, called by States Marine as an expert witness.

records. Nonetheless, he felt that the conduct of the investigation should not be left to the judgment of the regular auditors and that the Neutral Body must maintain the right to direct access to the records and files. McCone, on the other hand, testified that he believed that it was the opinion of the conference members (other than States Marine) that a line's own auditor should not examine an accused line's records and files, since this would eliminate the element of surprise, so necessary for effectiveness. Waldroup opposed the use of a line's auditors to examine its records but does not object to their being present as long as the Neutral Body does not relinquish control of the investigation.

The conferences contend that it is fairness, not criminal due process, which is demanded by Silver; that the latest proposed modifications incorporate every reasonable safeguard to assure fundamental fairness and more than satisfy the requirements of law for disciplinary action by voluntary associations.

Hearing Counsel believe that the provision of procedural and due process safeguards, which traditionally accrue to a criminally accused on trial before an established court, would render the Neutral Body system ineffective, thereby thwarting the expressed will of Congress. Specific reliance is placed upon the testimony of conference witnesses that should a line be permitted to confront an accuser there would be few if any complaints, and that should a line know that it is under investigation, and be given a notice period, it can at least try to hide the evidence.

The conferences point out that, under the rules applicable to voluntary associations, if a member is deprived of a pecuniary interest, "he is entitled to ask a court of equity whether the rules of the organization have been observed, whether anything has been done which is contrary to natural justice, and whether the decision complained of was rendered after notice and according to the law of the organization and in good faith." 6 Am. Jr. 2d §28. Earlier in this treatise it is provided that:

"The rules laid down for the government of the members of an association form the measure of their rights in the premises; it is vain to appeal to a constitutional bill of rights, for such bills of right are intended to protect the citizen against oppression by the government, not to afford protection against one's own agreements. When, however, the association departs from the letter and spirit of the contracts and does an act which it is not authorized to do under the contract, a member injured thereby may secure relief in the courts from such unauthorized action." 6 Am. Jr. 2d §20.

Steamship conferences are voluntary associations and States Marine has demonstrated its familiarity with the fact that aggrieved member lines may turn to the Commission as well as the courts.^{26/}

Right to Knowledge of Acquittal

States Marine also asserts that the accused should "receive notice of the verdict, whether a conviction or an acquittal". To accomplish this purpose it proposes the following procedure:

"(g) Post-hearing Procedure. After a hearing, the Neutral Body shall submit to the Ethics Committee and serve on the accused line a report signed by the person who conducted the hearing -

- (1) Summarizing the complaint and the evidence.
- (2) Setting forth findings of fact.
- (3) Specifying which charges in the complaint have been proved and which not proved.
- (4) Specifying the fine, if any, imposed for each violation found."

The conferences' latest proposed modification of Article 25(f)(4) contains provision for notice in either event as follows: "On the basis of its [Neutral Body's] decision, the respondent shall either be advised

^{26/} See Docket 920, supra, at 216.

that a breach has not been found or, should a breach be determined to have been committed, assessed liquidated damages."^{27/} This practice of giving notice is already followed by the present Neutral Body.

Recognition of Mitigating Considerations

A further provision urged by States Marine to be required by due process is described as "Letting the Punishment Fit the Crime". It prescribes the same maximum amounts set forth in Article 25(f)(4) of the conferences' proposed modifications but adds the following:

"(m) Criteria for Fines. The Neutral Body, and arbitrators reviewing its decisions, shall impose (or decline to impose) fines with due regard to the nature and gravity of the violation involved, taking account particularly of the following considerations:

(1) Whether the violation was innocently or purposely committed.

(2) The number of previous violations of the same or related type by the accused line.

(3) The financial importance of the violation to the accused line and to its shipper, consignee, competitor, or other affected interest.

(4) Whether the violation substantially offended the spirit of the conference agreement or was merely technical.

(5) Whether the violation of the conference agreement also constituted a violation of law.

(6) The fines or penalties customarily imposed by courts for offenses of comparable type and importance.

(7) Whether a fine or penalty has been imposed on or paid by the accused line for the same violation in a criminal or civil proceeding. "

States Marine argues that specific criteria of this nature are shown to be necessary by the fact that in Docket 920 it was assessed

^{27/} In addition proposed Article 25(f)(3) provides for such notification upon completion of an investigation.

maximum fines on three successive occasions (for refusal of access) even though at the time of the latter two the right of the Neutral Body (Lowe) to so act was in litigation. Citing Weems v. United States, 217 U.S. 349 (1910) it contends that, under the Constitution's prohibition against cruel and unusual punishment, the Supreme Court has condemned monetary fines and other punishments disproportionately severe in relation to the crime committed.

Conference witnesses urge, in substance, that the facts and circumstances vary as between individual cases; that the Neutral Body customarily considers the particular mitigating considerations material to each case; and that the direction of rigid criteria is both unnecessary and undesirable. McCone emphasized that refusal of access is considered to be among the more serious malpractices. On brief, conference counsel argues that the Neutral Body had no choice but to make the three assessments against States Marine, and that if it were possible to prevent the functioning of a Neutral Body merely by commencing litigation concerning its authority to act, the system would "be blasted into a cocked hat, as has largely been done by States Marine's litigious conduct". It is further argued that the criteria suggested by States Marine would offer merely another method of harrassing the Neutral Body in the legitimate exercise of its functions and that authorities involving criminal proceedings, such as Weems, are not relevant.

While the record does not show whether other fines have been in maximum amounts or something less, it is to be noted that Lowe, who served as Neutral Body for the period 1958-1963, investigated 46 cases and assessed fines in 13. Anderson, who then served for 3 months, investigated 6 cases and assessed fines in 3. Young has received 6 complaints involving 11 lines. Although, as of the time of this hearing, final determinations had not been made, 5 of the lines had been cleared.

The latest proposed modifications, and each of them are specifically referred to on brief by the conferences, include the following general provisions under Article 25(f)(4) for the consideration of mitigating circumstances:

"Notwithstanding the difficulty in assessing such damages precisely, in determining the amount of liquidated damages to be assessed the Neutral Body shall consider such mitigating circumstances as it may deem relevant."

There is no evident basis for anticipating that the Neutral Body will not exercise fundamental fairness in determining and considering such mitigating circumstances as may be reasonably determinable and relevant in each case.

Neutrality of the Neutral Body

States Marine also directs its protest to the issue of neutrality, or qualifications of the Neutral Body. As here posed, it relates directly to the asserted issue of due process. Under the presently approved system (see Appendix A) the Conference appoints a Neutral Body from responsible accountants or other persons. The person appointed may not be employed by nor financially interested in any party to the basic agreement. Under the latest proposed system (see Appendix B) the conference would appoint an impartial, independent person, firm or organization, subject to its disclosing to the conference any professional, business or financial interest it may have, then or later, with any member line. In the event of a complaint against a member with which it has any such interest, the Neutral Body would have to disqualify itself and appoint a substitute agent having no such interest.

The following revised proposals submitted by States Marine would outlaw Neutral Body interest in any conference member and provide that the Neutral Body's fees and expenses must be paid by the conference, not by a convicted line:

"Qualifications of Neutral Body. The Neutral Body may be any person, partnership or corporation which is neutral in the sense that it has no financial, corporate, or contractual interest in, or connection with, any conference member.

* * *

"Terms of Employment of Neutral Body. The Neutral Body shall be employed under a written contract to be disclosed to the members and approved by vote of at least two thirds of the lines entitled to vote. The contract shall specify (among other matters) the terms of compensation of the Neutral Body and shall provide for payment of its fees and expenses out of the conference treasury upon submission of a bill itemized in reasonable detail."

Carpenter stated that these provisions are necessary "to insure that an accused line obtains a reasonable opportunity to present its side of the case to a judge untainted by financial affiliation with the defendant's competitor . . ."^{28/}

Boyarsky testified that, in his opinion, it should be permissible for the regular auditor of an accused line to make the actual search of that line's files and records in conjunction with a Neutral Body investigation but that he would not wish to serve as Neutral Body were he affiliated with an accused or a complainant.

^{28/} States Marine relies on Tumey v. State of Ohio, 273 U.S. 510 (1927), a case which involved a criminal proceeding before a city mayor-judge who was to be paid \$12.00 as Court costs only upon conviction; U.S. v. Mississippi Valley Generating Co., 364 U.S. 520 (1961), commonly known as the Dixon-Yates case, which involved a suit in the Court of Claims to recover costs and damages under a Government-terminated contract; S.E.C. v. Capital Gains Research Bureau, 375 U.S. 180 (1963); an action by the S.E.C. seeking an injunction; Holt v. Virginia, 33 L.W. 4477 (May 17, 1965), wherein the Supreme Court set aside a pair of summary contempt convictions by a Virginia trial judge; and Rapp v. Van Dusen, ___ F. 2 ___ (C.A. 3, 1964), 2 CCH Avi. L.R. 17402, which involved a statute (28 U.S.C. §455) calling for the disqualification of federal judges under specific circumstances. None of these constitute authority with regard to the neutrality issue in this proceeding.

Hearing Counsel take the position that, to avoid the appearance of partisanship, any interest or affiliation of the Neutral Body in or with either the accused or the accuser should be disqualifying. However, disqualification because of such relationship with member lines other than the accused or the accuser is not urged because "we would soon run out of neutral bodies".

McCone and Cocke did not feel that the Neutral Body must be unaffiliated with other member lines. They saw no problem from the standpoint of fairness even if the Neutral Body were auditors for the accused. Waldroup stated that the Neutral Body should be permitted the right to have a professional relationship with member lines other than the accused. Conference witness Johns^{29/} testified that proposed Article 25 is not inconsistent or incompatible with the Code of Ethics of The American Institute of Certified Public Accountants^{30/} and that a member's professional affiliation with a complainant would not impair its independence. He contended that the Institute member (Neutral Body) would be operating under the provisions of an agreement with the conference, wherein the conference was the client, and that the source of the complaint would be immaterial. "It is a question of fact, whether the facts support a prima facie case". By way of emphasizing that professional relationships do not destroy independence in the accounting profession, Johns testified that "It is a common situation among the larger accounting firms to serve two or more competing enterprises and in my own personal experience in Chicago, not only do we, as the same firm, serve the two largest farm implements corporations, but we serve them right out the same office and

^{29/} Ralph S. Johns, partner in charge of the Chicago Office of Haskins & Sells; Chairman of the Ethics Committee of The American Institute of Certified Public Accountants, and a member of its Committee on Relations with Stock Exchanges and the Securities and Exchange Commission.

^{30/} Among the objectives of this organization are the maintenance of high standards, both technical and ethical, in public accounting.

have done so for over 50 years." However, he felt that, for practical rather than ethical reasons, he would not like to serve as the Neutral Body if the accused was his client . . . "one desires to avoid entering into a controversy with his own client".

The record shows that the conferences have selected major international accounting firms to act as Neutral Bodies because of their generally recognized high standards of professional independence and integrity; their technical ability to detect malpractices from a line's books and records; their world wide connections permitting prompt and competent investigations wherever necessary; and because of the absence of other known qualified candidates in Japan where both conferences are domiciled.

Waldroup testified that the term "Independent Certified Public Accountant" carries the understood meaning of true independents in relationships with clients, and that this is a basic principle upon which the public accounting profession has been founded and has progressed. It is one of its main reasons for being. The Code of Professional Ethics of the AICPA provides that "Independence is not susceptible of precise definition, but is an expression of professional integrity of the individual." Members must maintain prescribed standards of professional integrity or risk suspension or expulsion. No witness was able to suggest any other source of Neutral Body talent of similar professional integrity and requisite technical ability.

On brief, the conferences assert that every member line, save States Marine, believes this proposed provision to be eminently fair, and that no cogent reason has been advanced why international accounting firms such as Arthur Young & Company should not be permitted to carry on this work merely because they may professionally represent a member line which is not under investigation.

In addition to Young, the present Neutral Body,^{31/} there are only four other comparable international accounting firms in Japan. According to Waldroup, these are Arthur Anderson & Co., who resigned as Neutral Body and is unavailable; Deloitte, Plender, Haskins & Sells, who represent States Steamship Co.; Peat, Marwick, Mitchell & Co., who represent American President Lines and States Marine Lines, and Price, Waterhouse & Co., who represent United States Lines, Lykes Bros. and Waterman. While Young is not representing a conference member line at present, Waldroup stated that he did not know what the situation will be in the future. Boyarsky testified that he would not accept assignment as a Neutral Body if this would prevent his obtaining the accounting business of member lines.

In view of the fact that the Neutral Body functions are actually fact-finding rather than judicial; that the conclusive facts are usually, if not always, obtained from the books of account and records of the accused; that accounting firms are uniquely qualified both professionally and by procedural and ethical standards, to perform this work; that the conference rather than the accuser is the client; that fees are paid on the basis of time devoted to a case, and without regard to whether the complaint of malpractice is sustained or dismissed; that there is no evidence of actual bias or non-neutrality relating to any of the firms heretofore used; and that the application of unduly broad exclusions will disqualify or bring about the disinterest of most, if not all, of the otherwise eligible accounting firms, thereby destroying this self-policing system, contrary to the public interest and to the detriment of commerce, it is found that a Neutral Body should not be disqualified because of a disclosed business relationship, i. e., independent contractor for professional or business services, with a conference

^{31/} This firm was founded in 1894, and has 300 partners and a staff of 5,000 accountants. Fifteen accountants are assigned to the firm's office in Japan.

member line other than the accused. Any financial interest in any member line is found to be disqualifying. Proposed Article 25(a)(2) conforms to this finding.

The Right to Appeal

Finally, States Marine proposes that, under the due process fairness doctrine of Silver, a line should be vested with the right to demand an appeal from the Neutral Body's decision to an arbitration panel and that the fees and necessary expenses of the arbitrators should be paid by the conference. Silver does not discuss appeal to arbitration and no other relevant authority is cited. Carpenter simply explained that appeal is necessary to prevent "run-a-way decisions by a neutral body." Hearing Counsel also consider the right to arbitration to be desirable "as a double check on arbitrary action". All of the conferences' witnesses oppose such a provision. They contend that it is unnecessary and will weaken the Neutral Body system, particularly its effectiveness as a deterrent of malpractices; that since the Neutral Body must necessarily be fair and impartial, it incorporates the basic concepts of arbitration; that the Neutral Body would be better qualified to decide than a panel of arbitrators; that arbitrators are ineffective in investigating malpractices; and that disclosure of the identity of the complaining line and the source of information furnished in confidence would result from resort to arbitration. Cocke stated that arbitration would cause delays, be detrimental to the Neutral Body, and that the Neutral Body's decision should be final. He noted that Lowe and its successor, Arthur Anderson, resigned because they considered themselves "hamstrung" by the continuing litigation over their regular activities in Docket 920 and 920-1. Carpenter testified that Young threatened to resign for the same reason.

Waldroup stated that Arthur Young would not be willing to serve as Neutral Body if it must disclose confidential information, or if its neutrality is subject to constant challenge, or if arbitration is provided.

To be effective, self-policing must be as simple, direct and conclusive as the law allows . . . not due process of law as drawn from the Bill of Rights but that law, substantive and procedural, which is properly applicable to self-regulation by voluntary associations. The specifics of individual systems must be varied as required by relevant differences in different trades, but the conferences and the Commission must be ever careful not to tie a system up with so many safeguards that it cannot work. Such a system would be inadequate on its face and therefore unapprovable as a matter of law. If it is not effective it is not responsive to the command of Congress. Had formalized, restrictive procedures of the type proposed by States Marine been intended, there would have been no need for the introduction of self-policing systems. Complainants could then and still can file complaints alleging malpractices with the Commission for hearing and decision under section 22 of the Act and the Commission's Rules of Practice and Procedure. But Congress has directed the Commission to disapprove any basic conference agreement that it finds to be without provision for adequate policing.

Conference counsel and Hearing Counsel rightly contend that these proceedings are not similar to criminal trials, as urged by States Marine, and that the accused is not entitled to the procedural and due process safeguards traditionally extended by an established court to a criminally accused. The Neutral Body is not intended to act as a judge presiding over an adversary system. It is an informal investigative and arbitral body which cannot perform its unique functions if encumbered by the restrictions placed upon judges and the procedural rules enforced upon their determinations.

Stated in the negative, this record provides no basis, in law or fact, for a finding that the proposed self-policing systems must be disapproved unless they include provisions for notice prior to investigation, identification of the accuser, the disclosure of all information in its original form . . . even though not relied upon for

decision, a hearing procedure satisfying all constitutional due process safeguards, and the right to appeal to arbitration. Under section 7(c) of the Administrative Procedure Act, 5 U.S.C. 1001 et seq., such an order of disapproval would have to be "supported by and in accordance with the reliable, probative and substantial evidence".

In its Report, decided October 30, 1963, here on remand, the Commission found:

" In a recent amendment to section 15, Congress expressed its concern over past failures of steamship conferences operating in our foreign commerce to live up to the terms of their agreements when it directed this Commission to disapprove any agreement upon a finding of inadequate policing of the obligations under it.^{3/} Congress, however, left to the individual conferences the responsibility of selecting the method best suited for their particular trade and situation. In furtherance of this intent of Congress we have adopted a broad policy respecting self-policing systems of conferences operating in our foreign commerce.^{4/} While section 15 requires self-policing modifications to be approved under that section as comprising a part of the complete agreement of the parties, we are not inclined when considering approval to specify the procedures by which the parties seek to insure that each will fulfill its obligations to the others. It seems to us that the prime concern when considering whether to approve such an agreement is whether it is unjustly discriminatory as between the carriers party to it and whether it is reasonably probable that the agreement will insure adequate policing, thereby fostering the free flow of our commerce unhindered by malpractices.

" The proposed modifications now before us are designed to strengthen the self-policing systems of the respondent conferences. The essence of protestants' argument against

approval of these agreements is that the power vested in the neutral body is capable of abuse. The Commission must assume, however, that once the agreement is approved the conference will live up to its obligation to apply that agreement so that it does, in fact, adequately and without discrimination police conference obligations. We are of course under a continuing duty to maintain surveillance of these and all section 15 agreements, and should respondents fail to apply the agreements approved herein effectively and without discrimination, we shall take such steps as are necessary under the circumstances.

"3/ Public Law 87-346 (75 Stat. 764) amended section 15 by including inter alia the following provision: 'The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it. . .'

4/ See statement of the Commission upon promulgation of rules governing self-policing systems, 28 F.R. 9257, August 22, 1963."

Although lengthy, more lengthy than it need have been, this record on remand, considered in the light of Silver and otherwise, merely serves to affirm these previous findings of the Commission, particularly when applied to the conferences' latest proposed modifications. States Marine's case continues to be premised upon anticipation rather than experience and cannot be relied upon to avoid the further finding, here made, that there is provision for reasonable notice, reasonable hearing and fundamental fairness in all respects. Silver requires no more. The Commission's findings are additionally validated by a very recent decision of the Court of Appeals for the District of Columbia Circuit in Aktiebolaget Svenska Amerika Linien (Swedish-American Line) v. Federal Maritime Commission, ___ F. 2d ___ (No. 18,554) (June 10, 1965). The Court, through Judge Washington,

stated the law as it controls the Commission's power and duty with respect to agreements under section 15 of the Act as follows:^{32/}

" Although the Commission disapproved the tying rule under 46 U.S.C. §814 [section 15 of the Act], we are unable to find any ultimate factual conclusion within those specified in that section which would support its disapproval. That is, there is no finding that the rule is 'unjustly discriminatory or unfair as between carriers, . . . , ' that it operates to the detriment of the commerce of the United States, or is contrary to the public interest, or is in violation of 'this chapter.' In the absence of such a specific finding, the rule is, by direction of Section 814, to be approved." (slip opinion, p. 9).

* * *

" The statutory language authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of the four ways set out in the section by Congress." (Underscoring supplied).

The command of the law is absolute. The Commission cannot disapprove, modify or cancel an agreement filed for approval under section 15 unless there is a positive finding that (1) the agreement is unjustly discriminatory, (2) detrimental to commerce, (3) contrary to the public interest, or (4) otherwise in violation of the Act. This record does not show and will not support such finding based upon failure of the proposed modifications to afford an accused any and all requisite due process safeguards.

Unanimity

As earlier noted (p. 2) the Commission's order served November 19, 1964 poses the issue:

^{32/} See also Examiner Page's Initial Decision in Trans-Pacific Freight Conference (Hong Kong), Docket 1159 (June 17, 1965) wherein this decision is applied. The fact that it involved a "tying agreement" rather than a "self-policing agreement" is not relevant.

"whether or not section 15 of the Act requires that modifications to agreements approved thereunder be adopted only upon unanimous vote of the parties to such approved agreement."

Articles 18 and 19 of respondents' basic agreements set forth voting procedures and requirements. Pursuant to Article 18, three-fourths of all parties entitled to vote constitute a quorum, except when changes in the basic agreement are being considered, when it requires four-fifths of those parties entitled to vote to make a quorum. Article 19(a) provides that once the four-fifths quorum is present, all parties agree to be bound by changes to the basic agreement made with the consent of two-thirds of all parties entitled to vote. Articles 18 and 19 were a part of the approved basic agreement when States Marine was admitted to membership.

States Marine contends that under contract law, modifications to basic conference agreements cannot be approved by the Commission unless unanimously adopted. As it did before the Commission in the original proceeding, it argues that section 15 of the Act pertains to ". . . every agreement . . . or other modification or cancellation thereof to which [the carrier] may be a party or conform in whole or in part . . ." and that States Marine is not a party as it voted against and does not conform to the pending modifications and cannot be legally bound thereby. Moreover it states that of 102 basic agreements on file with the Commission, at least 69, or 68%, require unanimous vote for modifications;^{33/} that the Pacific Westbound and Far East Conferences (both serving the outbound trades to Japan and having memberships similar to respondent inbound conferences) function under unanimous modification rules; that less than unanimous modification rules bring about friction, and make it impossible for States Marine to maintain control over its own business and corporate affairs; and

^{33/} It also takes the position that of the remainder, there are 14 which do not state what voting majority is required for modification and therefore cannot be amended unless all concur.

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^{33/} It also takes the position that of the remainder, there are 14 which do not state what voting majority is required for modification and therefore cannot be amended unless all concur.

that, as a matter of economic reality, freedom to escape the coercion of member line conference colleagues does not exist because a line which resigns from a conference is precluded from carrying cargoes shipped under dual rate contracts.

Respondent conferences contend that section 15 does not require, either expressly or impliedly, any particular quantum of vote for adoption of modifications to agreements approved thereunder. Reliance is placed upon Pacific Coast European Conference Agreement, 3 U.S.M.C. 11, 19-20 (1948) wherein the Commission stated:

"The question here is not whether a unanimous or majority rule might be better or whether it conceivably could be abused but whether the record indicates that the rule has been used by respondents in violation of the Act . . .

"There are conferences which have the unanimous, two-thirds, three-fourths, or majority voting rules. No one of these can be disapproved as an organizational procedure, but the lawfulness of any of them must be based upon evidence as to their working in practice as introduced in a public hearing. Tests of lawfulness are found in actions or sources of conduct, not in organizational procedure.

"We find that the rule in Agreement No. 5200 requiring that decisions thereunder be determined by unanimous vote has not been shown to be unlawful."

Maatschappij "Zee-Transport" N.V. (Oranje Line) v. Anchor Line Ltd. 5 F.M.B. 714, 729-730 (1959) is also cited as holding that

"in the absence of evidence concerning the actual results of operations under the voting rules, no findings concerning them may be made."^{34/}

Accordingly, argue the conferences, the only basis upon which the Commission can properly find that section 15 requires unanimity would be upon evidence that less than unanimous voting has been unjustly discriminatory or unfair as between carriers, or has operated to the detriment of commerce, or contrary to the public interest, or somehow has been in violation of the Act. The lone fact that States Marine would prefer unanimity will not support any one of the findings.

The conferences further contend that when States Marine joined Trans-Pacific in 1949, the Agreement called for a three quarters voting rule. When this was changed to a two thirds rule in 1952, States Marine offered no objection. When States Marine joined Japan-Atlantic in 1947, the Agreement called for a two thirds majority vote. When this provision was amended in 1952 States Marine raised no objection.

Finally the conferences contend that analogies drawn by States Marine to private contract law are improper because, under the usual form of contract, the relationship of the parties is fixed by the acceptance of a certain offer, and changes are made either by novation or by provision for renegotiation; that in contrast, respondents' agreement set up procedures under which the parties and the procedures

^{34/} States Marine contends that there is a critical difference between (a) voting requirements on matters within the scope of a conference agreement and (b) voting requirements for modification of a conference agreement. This may be true in some respects but the instant purpose for which the conferences cite these cases offers no basis for relevant distinction. States Marine seeks to support its contention by urging an analogy between the present problem and a rule issued by the Civil Aeronautics Board, in its Economic Regulations, entitled Participation of Air Carrier Associations in Board Proceedings (14 CFR 263). The relevancy of this rule is not apparent.

change according to a uniform method; that a conference agreement is the embodiment of the premise that each of the parties must relinquish some freedom of action, in exchange for the benefits of participation in an association arrangement; and that conferences are voluntary associations subject to well established law applicable thereto. Cited, e.g., is Rachford v. Indemnity Insurance Co. 183 F. 2d 875 (S.D. Cal. 1960) where the Court said:

"Mrs. Rachford, like anyone else becoming a member of an organization, was charged with knowledge of and was subject to the regulations concerning membership and the rights of members, as set forth in the charter, constitution and by-laws. Weber v. Marine Cooks & Stewards' Assoc., 1949, 93 Cal. App. 2d 327, 208 P. 2d 1009; 4 Am. Jur., Associations & Clubs, §12. . . ."

Hearing Counsel oppose a unanimous voting requirement on the grounds that the Neutral Body procedure proposed by States Marine would seriously impede the system thereby defeating the Congressional desire for effective conference self-policing. They further argue, in short, that under unanimity one line could thwart self-regulation; that by joining an anti-trust proof conference, a line must be held to surrender some sovereignty; that since self-regulation is central to section 15, a line agrees to accept self-regulation by joining a conference; that no line should be able to circumvent this by voting against it; that, on the facts in this case, "if States Marine is not bound by less than unanimity this line can, and will, doom self-regulation by the neutral body in subject trades", thereby proving a unanimity rule to be "detrimental to commerce" and "contrary to the public interest"; and that the Commission should judge section 15 modifications exclusively on the basis of how they comport with the standards specifically stated in section 15. If an interested party proves that they do not meet these standards, they must be disapproved, but not merely because such party voted against them.

Under Public Law 87-346, supra, the Commission must give direct consideration to the effectiveness of a self-regulation system as such, and as an element of "public interest" and "detriment to commerce". It has been shown, and it is here found, that the public interest and the commerce require strong neutral body systems in these inbound trades from Japan. Silver does not refer to unanimity.

In its previous Report in this proceeding, supra, the Commission held:

"States Marine contends that notwithstanding the language of Articles 18 and 19, a modification of the basic agreement without unanimous consent of the parties alters the contractual relations of the dissentient parties contrary to the principles of contract law and is thus invalid. States Marine argues, in an attempt to avoid its obligations under Articles 18 and 19, that because it was not among the original organizers of the respective conferences and had no part in the formulation of their basic agreements it remains free to attach those portions of the agreements which it considers improper. For States Marine to prevail, some provision of section 15 must render the voting requirements of Articles 18 and 19 invalid, for if they are valid States Marine as a subscriber to the agreement is bound thereby.

"In attempting to show that the voting requirements are invalid States Marine attempts to draw analogies from the field of private contract law. We think these analogies improper. Private contracts, normally between two parties, cannot reasonably be equated with agreements approved under section 15. An agreement providing for the organization of a conference to operate in our foreign commerce is of necessity an agreement which attempts to reconcile a number of divergent interests insofar as is consistent with Congressional policy and the public interest in the free flow of our foreign commerce. Such an agreement must provide for the continuing commercial

operations of a relatively large number of conference members with as little friction and obstruction as possible. The very heart of such an agreement is that each individual line relinquishes some of its freedom of action, in exchange for the benefits resulting from participation in the conference arrangement.^{2/}

"This concept of majority rule is not uncommon in the ocean freight industry. A good many agreements on file with the Commission provide for the modification thereof by a stated majority. We do not consider it unreasonable for a conference to make such a provision in its basic agreement, provided it is not applied so as to contravene the standards of section 15. We find nothing in the concept of majority rule as applied to the proposed modifications here under consideration which renders it discriminatory as between carriers or shippers, detrimental to the commerce of the United States, contrary to the public interest or otherwise contrary to the requirements of section 15. States Marine in accepting membership in the respondent conferences has bound itself to the terms of the basic agreement, and so long as it chooses to remain a member it must conform to all modifications thereto which are regularly made and duly approved by the Commission.

"^{2/} This is by no means a novel relationship. Analogous situations pervade our political, economic and social structure. Just one example in the economic sphere is found in corporate organizations. A corporation can make fundamental changes in its charter, changing the very nature of the corporate business, and most states require only that the consent of two-thirds or three-fourths of the stockholders be given to this change. The dissenting stockholder must either bow to the will of the majority, or sell his stock. The latter alternative is, in effect, resignation from the corporation."

In Swedish-American Line (June 10, 1965), supra, at n. 5, the Court upheld the Commission's power to disapprove an agreement which it had previously approved "provided the Commission finds that the agreement does one of the four things named in the statute as grounds for disapproval." However, it pointed out that where the disapproval follows a history of prior approvals "we think that the findings should be scrutinized by a reviewing court with greater care."

Section 15 of the Act does not require that modifications to agreements approved thereunder be adopted only upon unanimous vote, nor does this record contain substantial evidence adequate to a finding that the conferences' presently approved majority voting rule "does one of the four things named in the statute as grounds for disapproval."

The Commission's vacated decision, as above quoted, is clearly supported by this record on remand and it is so found.

In this proceeding, as before, States Marine objects to the standard form of subscription executed by the conference chairmen in submitting proposed agreement modifications to the Commission for approval. This form provides:

" IN WITNESS WHEREOF the [conference], the members of which are all hereinafter listed, has authorized the foregoing amendments by resolution passed at its regular conference meeting held _____, 19 ____, in Tokyo, Japan. "

There follows a typed list of the membership and the signature of the conference chairman as such. States Marine contends that this creates "a record which on its face is misleading, a half truth, and may be utterly false" in that the signature of the conference chairman on behalf of the entire membership implies that the modification was carried unanimously. This contention is without merit. Conference chairmen are merely accomplishing the ministerial function of filing duly adopted modifications on behalf of the conference and in so doing are listing the lines currently holding memberships, all of whom are bound by the modifications. Such listing has nothing whatever to do

with a vote tally or representation of unanimity. Both the Commission and the individual member lines are on direct notice that under the provisions of Articles 18 and 19, supra, resolutions referred to in the standard form require the affirmative vote of only a two-thirds majority. On this record, it cannot be found that the form is actually misleading or otherwise in violation of the Act.

States Marine also complains about the failure of conference minutes to record dissenting votes of individual member lines. As this subject is among those included in a pending rule-making proceeding in Docket No. 1194 it will not be ruled on here. However, during the interim, it may be noted that any member has a right to require that the minutes specifically reflect its dissent. This right is not denied by the existing agreement of the member lines whereby vote tallies are not recorded in the minutes.

Hearing Counsel suggests that Article 25(c) should be modified to eliminate penalties for failure to report malpractices except in cases of collusion. This proposal was voiced prior to the hearing but remains unsupported by the record.

Findings and conclusions proposed by the parties are incorporated herein to the extent that they are found to be material and supported by the record, and are otherwise denied.

Upon the record as a whole it is found and concluded that:

Agreement No. 150-21 as modified by No. 150-29, and Agreement No. 3103-17 as modified by No. 3103-26 are not found to be unjustly discriminatory or unfair as between carriers. . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Act, and they are hereby approved pursuant to section 15 of the Act. An appropriate order will be entered.

/s/ John Marshall
Presiding Examiner

Washington, D.C.
August 5, 1965

APPENDIX A

10. BREACH OF AGREEMENT. (a) In the event of any violation of this agreement by any of the parties hereto and/or their respective agents, except as provided in Articles 25 and 30 hereof and as otherwise agreed upon for specific violation covered by Conference Resolution passed in conformity with the provisions of the basic agreement, such party or parties shall be subject to the payment of damages for each and every violation which shall be decided and assessed to the satisfaction of all parties hereto, except the party or parties charged with the violation, but if the party and/or parties hereto committing the alleged violation of this agreement are dissatisfied with the decision come to, such party and/or parties shall have the right to appeal, in which event the question of breach of agreement and damages shall be left to the determination of three arbitrators to be nominated within 30 days from the day on which the appeal of the party and/or parties charged with the violation will be received at the conference office.

One of the arbitrators will be nominated by two-thirds of the parties hereto, except the party or parties charged with the violation, one by the party or parties charged, the third shall be appointed in agreement of the two arbitrators so nominated. The arbitrators shall make their award friendly and the decision of two or more of the arbitrators shall be final and binding on the parties hereto. There shall be no appeal against the award of the arbitrators.

Any fine assessed by the Neutral Body under this agreement shall be paid to the conference. All conference members agree that the existing Twenty-Five Thousand Dollars (\$25,000.00) U.S.A. currency faithful performance bond already posted with the conference shall also serve as a guarantee of the faithful performance of the foregoing and of prompt payment of any fine which may accrue against any party for its acts or the acts of its agents, sub-agents, subsidiary and/or associate companies under this agreement. Fines

collected under this agreement shall be used towards defraying the expenses of the Neutral Body and other expenses which may be incurred in connection therewith. The maximum fines shall be:

- a) First offense Ten Thousand Dollars (\$10,000.00) U. S. A. currency or equivalent in yen at the official mean rate of exchange.
- b) Second offense Fifteen Thousand Dollars (\$15,000.00) U. S. A. currency or equivalent in yen at the official mean rate of exchange.
- c) Third offense Twenty Thousand Dollars (\$20,000.00) U. S. A. currency or equivalent in yen at the official mean rate of exchange.
- d) Fourth offense and subsequent offenses Thirty Thousand Dollars (\$30,000.00) U. S. A. currency or equivalent in yen at the official mean rate of exchange.

(b) In addition to the payment of damages, the offending party at the option of the conference shall be liable to expulsion from the conference or suspension of voting rights for such period of time as the conference may determine. Determination in the first instance as above as to a violation of this agreement and/or of any rules, regulations or tariff provisions of the conference, and whether the penalty shall be expulsion, suspension of voting rights and/or the payments of damages, and if the latter, the amount thereof, shall be made in accordance with Article 19.

(c) In no case shall the party complained against have any vote in the determination of any of the foregoing matters. The party complained against shall have the right to be heard and to offer a defense against the accusation even though such party may not be afforded the right to vote on his guilt or innocence.

(d) No expulsion shall become effective until and unless notice thereof, with a detailed statement of the reason or reasons therefor, shall have been air-mailed or cabled to the Governmental agency charged with the administration of Section 15 of the United States

Shipping Act, 1916, as amended. Notice of suspension of voting rights pursuant to this article shall be furnished promptly by air-mail or cable to the aforementioned Governmental agency.

12. FAITHFUL PERFORMANCE. (a) As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or of any award or judgment which may be rendered against them hereunder, the parties hereto agree to deposit with the conference the sum of Twenty-five Thousand Dollars (\$25,000.00) in United States Government Bonds, or in United States currency, or security bond of like amount satisfactory to the conference, which shall be deposited or invested as may be agreed by the parties pursuant to Article 19. Any interest accruing thereon shall be for the account of the party making such deposit and shall be remitted promptly to such party if received by the conference. Each of the parties further agrees to deposit additional cash or security upon demand so as at all times to maintain cash or securities or any combination of both of a total market value equivalent in United States currency to the amount hereinabove specified. Such deposits or the proceeds thereof shall be applied to the payment of any damages imposed in accordance with Article 10 or elsewhere in this agreement, unless otherwise fully paid or previously satisfied.

(b) In the event of the termination of this agreement or the termination of membership or withdrawal of any of the parties hereto, the deposits made by the parties concerned shall be returned to them, together with any accrued interest in the possession of the conference, but only after any indebtedness to the conference has been fully satisfied.

25. NEUTRAL BODY. There shall be a Neutral Body selected and appointed by the conference from responsible accountants or other person or persons, not a party to, nor employed by or financially interested in any party to the agreement upon such terms as are agreed between the conference and the Neutral Body. The Neutral Body shall have the following powers, duties and responsibilities:

1. To receive complaints in writing from members of the conference pursuant to their obligations hereunder to report malpractices.
2. To investigate said complaints and receive evidence thereon from members of the conference or from the conference offices or otherwise.
3. To engage agents, lawyers or other experts in connection with its investigation and consideration of complaints and to pay on behalf of the conference all costs incidental to engagement and use of such agents, lawyers and other experts.
4. To have absolute discretion to decide whether or not an infringement has taken place and the conference shall have no right to question such decision, subject to the maximum fines set forth below:

The maximum fines assessed by the Neutral Body shall be:

- | | |
|--|------------------|
| a) First offense up to a maximum of | U.S. \$10,000.00 |
| b) Second offense up to maximum of | U.S. \$15,000.00 |
| c) Third offense up to a maximum of | U.S. \$20,000.00 |
| d) Fourth offense and subsequent offenses up to a maximum of | U.S. \$30,000.00 |

5. To report to the extent appropriate the result of its investigation to Ethics Committee but without disclosing the names of complainants. The Ethics Committee shall notify the member lines through the conference Chairman.
6. To give directions as to payment of fines after assessment and notification to the Ethics Committee.
7. The undersigned lines promise to report immediately to the Neutral Body directly any apparent or alleged deviation from the conference agreement of its rules and regulations of correct and ethical practices thereunder which come to their attention or knowledge.

All lines agree to accept the decision(s) and any assessment(s) of fines thereof by the Neutral Body as final and binding.

8. To enable complaints to be investigated, the conference shall make available to the Neutral Body all records, correspondence and documents of every kind wherever located and give all assistance and information whatsoever verbal or otherwise which may be required by the Neutral Body at their absolute discretion. All the records of the freight conference at the secretary's office will also be available to the Neutral Body.

9. The conference members jointly and severally shall indemnify the Neutral Body against any liability to third parties including employees under any libel or other action which might be brought against the Neutral Body arising from the performances of its duties under this agreement. The conference members jointly and severally shall have no right to claim against the Neutral Body or their agents in any such libel or other action.

10. The retainer fee and other compensation for services of the Neutral Body shall be as agreed between the member lines and the Neutral Body.

APPENDIX B

The original version is Agreement 150-21. Modifications proposed by Agreement 150-29 are indicated by crossing out (delete) and underlining (add).

Article 10. BREACH OF AGREEMENT

~~(a) Except as provided in Articles 25 and 30 hereof and as otherwise agreed upon for specific breaches covered by Conference Resolution passed in conformity with the provisions of the basic agreement, in the event of any breach of this Agreement by a member and/or its agents, such member shall be subject to the payment of damages for each and every such breach. The determination of a breach and the amount of damages payable therefor shall be decided and assessed by vote of the Conference under Article 19 hereof; provided however that the member charged with breach shall not have a vote.~~

(a) In the event of any breach of the terms of this Agreement by a member and/or its agents, such member shall be subject to the payment of damages for each and every such breach. The determination of a breach and the amount of damages payable therefor shall be decided and assessed by vote of the Conference under Article 19 hereof; provided however that the member charged with a breach shall not have a vote; and provided further that breaches of the terms of Articles 25 and 30 and breaches involving malpractices as defined under Article 25 shall not be determined hereunder.

If the member committing the alleged breach of this Agreement is dissatisfied with the decision, such member shall have the right to appeal, in which event the questions of breach of the Agreement and damages shall be left to the determination of three arbitrators to be nominated within thirty (30) days from the date of receipt of said member's appeal at the Conference office.

One arbitrator shall be nominated by two-thirds of the members, excluding the member charged with breach, one by the member charged and the third shall be appointed by agreement of the two arbitrators

so nominated. The arbitrators shall make their award by decision of two or more of them, and the award shall be final and binding on all members. There shall be no appeal against the award of the arbitrators. Nothing contained in this agreement shall interfere with the rights of any member line under the provisions of the Shipping Act, 1916, as amended, or the jurisdiction of the Federal Maritime Commission under said Act or any other pertinent Federal laws.

(b) In lieu of or in addition to the payment of damages, the offending member, at the option of the Conference, shall be subject to expulsion from the Conference or suspension of voting and other rights for such period of time as the Conference may determine. The determination of breach and assessment of the penalty of expulsion or suspension and, if suspension, the duration thereof, shall be in accordance with paragraph (a) above.

(c) In no case shall the member complained against have any vote in the determination of any of the foregoing matters. The member complained against shall have the right to be heard and to offer a defense against the allegations even though such member shall not be afforded the right to vote on the matter.

(d) No expulsion shall become effective until and unless notice thereof, with a detailed statement of the reason or reasons therefor; shall have been furnished the expelled member and a copy airmailed or cabled to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended. Notice of suspension of voting rights pursuant to this Article shall be furnished promptly by air mail or cable to the aforementioned Governmental agency.

Article 12. FAITHFUL PERFORMANCE

(a) As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or any award of the Neutral Body or any other award of judgment which may be rendered against them hereunder, the members agree to

post and maintain with the conference the sum of Twenty-Five Thousand Dollars (\$25,000.00) in United States currency or United States Government Bonds, which shall be deposited or invested as may be agreed by the parties pursuant to Article 19.

(b) In lieu of United States currency or United States Government Bonds provided for in the preceding paragraph a member may post and maintain with the conference one or more irrevocable letters of credit in the total sum of Twenty-Five Thousand Dollars (\$25,000.); provided that those letters of credit create an absolute obligation for the bank to pay against drafts drawn by the conference chairman or the Neutral Body accompanied by a debit note bearing a date not later than "thirty (30) days prior to said notice and, in the case of a Neutral Body assessment, a copy of the Neutral Body report; and further provided, that no other conditions for payment may be inserted in such letters of credit; that they are at all times maintained in the total sum of Twenty-Five Thousand Dollars (\$25,000.00); and that they are in all other respects satisfactory to the conference.

(c) The deposits and letters of credit provided for in paragraphs (a) and (b), and the proceeds thereof, if any, shall be applied to the payment of any dues, damages or Neutral Body assessments payable under Articles 10 and 25 or elsewhere in the agreement, unless fully paid or previously satisfied before they become delinquent in accordance with Article 28 hereof. In the event a letter of credit is posted in lieu of United States currency or United States Government Bonds, the Neutral Body will have the authority to draw drafts under the credit, accompanied by a copy of its report finding a breach and assessing damages and also a copy of the delinquent debit note, and to receive payment of the amount assessed from the bank on behalf of the conference.

(d) In the event of the termination of this agreement or termination of a membership or withdrawal of any of the members, the deposits made by the members concerned shall be returned to them, together with any accrued interest in the possession of the Conference, or in the

case of letters of credit, they will be revoked, but only after any indebtedness to the conference has been fully satisfied and three (3) months have elapsed from the date of termination or withdrawal or until a decision is made in any Neutral Body cases pending against such member on the effective date of termination of withdrawal or in any case filed within said subsequent three-month period.

Article 25. NEUTRAL BODY

(a) Appointment and Qualifications of the Neutral Body:

(1) The Conference shall appoint, upon terms to be fixed by separate contract, an impartial independent person, firm or organization to be designated the Neutral Body which shall be authorized to receive written complaints reporting possible breaches of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice, and to investigate and decide upon such alleged breaches and, if such breaches are found, to assess damages, and in addition, to collect damages assessed, after payment thereof becomes delinquent.

(2) Appointment of the Neutral Body hereafter will be by vote of the Conference membership under Article 19 of the Conference Agreement. The appointment will be made from amongst candidates which are qualified and willing to serve.

Prior to such appointment a candidate will be required to divulge to the Conference any ~~material~~ "professional or business relationships or financial interests" ~~or service contracts~~ (hereafter in this Article simply "interests") which it may have with any of the members, their "employees, agents, subagents or their subsidiaries or affiliates" (hereafter in this Article simply "agents"). The candidate will also be required to agree, in the event of appointment, to divulge any future proposals it might receive to create such interests, and promise to obtain Conference approval thereof before accepting any such proposal. Such interests so divulged, if any, exclusive of financial interests, will not affect the qualification of the Neutral Body when appointed by the Conference with knowledge thereof, and the members will not raise

an objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint against a member with which it may have such an interest. After disqualifying itself the Neutral Body is authorized to appoint an agent without such interest in the respondent to conduct the particular investigation and handle the complaint on behalf of the Neutral Body and such appointee shall have all of the authority and duties of the Neutral Body for that particular matter up through the date when the appointee reports its decision to the Ethics Committee under this Article 25(f)(4).

(3) The Neutral Body will have the authority and responsibility to engage agents, lawyers and/or experts, including shipping experts, who can assist with its investigation and consideration of complaints and to pay on behalf of the Conference all costs incidental thereto. Such agents or experts appointed by the Neutral Body must not have any interest in the particular member named in the particular complaint, although they will not be disqualified because they may have an interest, exclusive of a financial interest, with any other member or its agents.

(4) For purposes of this paragraph (a), the words "financial interests" do not include professional or business relationships whereby the Neutral Body or its agents or experts are engaged as independent contractors for professional or business services.

(b) Jurisdiction of the Neutral Body:

(1) The Neutral Body shall have jurisdiction to handle, in accordance with the procedures of this Article all written complaints submitted to the Neutral Body by the Conference Chairman or a member alleging breach of the Conference Agreement, Tariff Rates, or Rules and Regulations involving malpractice or, on its own motion, any breaches of the terms of this Article 25; ~~provided that nothing herein contained shall change the functions of the Migrating Committee.~~

(2) "Malpractice" as used in this Article shall mean any direct or indirect favor, benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer, or other cargo interests or any of their agents, or any other act or practice resulting in unfair competitive advantage over other members.

(3) The Neutral Body shall have no authority to investigate any breach involving a malpractice which occurred more than two years before the filing of a written complaint pursuant to Article 25(b)(1), or more than two years before the discovery thereof under Article 25(f)(1).

(c) Member Lines' Responsibility to Report Breaches and Assist Investigations:

(1) The members and/or the Conference Chairman shall report promptly to the Neutral Body in a written complaint any and all information of whatsoever kind or nature coming to their knowledge which, in their opinion, indicates a breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or any breach of this Article 25 by a member or its agents, and failure to report such information by any member will be a breach of this Article.

(d) Investigation:

(1) The Neutral Body and/or its agents, shall have the power, authority and responsibility to investigate written complaints and in investigating said complaints to call upon a member or its agents at any of their offices during office hours and inspect, copy and/or obtain "correspondence, records, documents, signed written statements or oral information and/or other materials" (hereinafter in this Article "materials"), which materials are deemed by the Neutral Body in its sole discretion to be relevant to the complaint. Upon making such a call the Neutral Body shall have the right to see and copy such materials immediately and without prior screening by the member or its agents.

(2) Correspondingly each of the members shall have the duty and responsibility to supply such materials, and to cooperate in interviews promptly upon demand made in person by the Neutral Body or its agents and without prior screening, whether said materials or personnel are

located in the member's own offices or in its agents' offices. Failure of a member or its agents to supply the materials required by the Neutral Body or its agents promptly will constitute a breach of this Agreement by the member, and the member undertakes to thoroughly inform its agents of the member's liability for their conduct and obtain their commitment to comply with the Conference Agreement, Tariff Rates or Rules and Regulations. In addition the members undertake and affirmative duty to cooperate and assist the Neutral Body in obtaining other required information whenever possible.

(3) The records of the Conference will be made available to the Neutral Body on request and the Conference Chairman and staff will render all assistance possible to the Neutral Body during investigations.

(e) Confidential Information:

(1) The Neutral Body will under no circumstances disclose the name of the complainant to the respondent or anyone else, including the Neutral Body's agents, unless specifically authorized to do so by the complainant.

(2) The Neutral Body will treat all information received during investigations regardless of the sources, as confidential and will not divulge any such information to anyone, except in reporting breaches found and damages assessed to the Ethics Committee, and then only to the extent that the Neutral Body itself deems appropriate.

(f) Hearing for the Respondent; Neutral Body Decisions and Announcement Thereof:

(1) On concluding its investigation, the Neutral Body will consider the information obtained and decide in its absolute discretion whether the facts have been sufficiently established to constitute a breach of the Agreement, Tariff Rates, or Rules and Regulations, involving a malpractice, and if a breach involving a malpractice is found which was not covered by the complaint, such breach may also be reported and damages may be assessed thereon against any member liable.

(2) In deciding whether a breach exists based on the results of its investigation, the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead it will employ rules of common sense in determining breaches and assessing damages and the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach occurred.

~~(3) After the Neutral Body has completed its investigation and arrived at its tentative decision that there was a breach (but before announcing the breach to the Ethics Committee, and even before the amount of damages is decided), the Neutral Body will inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose. Within fifteen (15) days, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or counsel, and offer to the Neutral Body such explanation as it may choose at such meeting.~~

(3) After the Neutral Body has completed its investigation, it shall advise the respondent either that a breach has not been found or that there are reasonable grounds to believe that a breach occurred. In the latter event, the respondent will be informed at this time of the nature of the alleged breach, and the evidence concerning it which the Neutral Body in its absolute discretion is able to disclose. In so advising the respondent, the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information. In all cases, however, the Neutral Body will inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fair play. Within fifteen (15) days, or within such reasonable time thereafter as the Neutral Body may in its sole discretion grant, if the respondent so requests, it may meet with the Neutral Body, with or without its own

accountant and/or attorney, and offer to the Neutral Body such explanations and/or rebutting evidence as it may deem proper and desirable.
At such hearing, the Neutral Body shall consider all of the available evidence and make its decision in accordance with the standards set forth under Article 25(f)(2) hereof.

~~(4) The Neutral Body will then make its final decision and either discharge the respondent or assess liquidated damages against him.~~
On the basis of its decision, the respondent shall either be advised that a breach has not been found or, should a breach be determined to have been committed, assessed liquidated damages. In assessing said damages, the members recognize that breaches of the Conference Agreement, Tariff Rates or Rules and Regulations cause substantial damages, not only in lost freight but in consequent instability of the Conference rate structure. The members further recognize that the damages caused are cumulative with the number of breaches, but the members further recognize that it is difficult to assess such damages precisely. Therefore the Neutral Body is authorized to assess liquidated damages in accordance with the following schedule.

- a) First breach: maximum of Ten Thousand Dollars (\$10,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- b) Second breach: maximum of Fifteen Thousand Dollars (\$15,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- c) Third breach: maximum of Twenty Thousand Dollars (\$20,000) U.S.A. currency or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- d) Fourth breach and subsequent breaches: maximum of Thirty Thousand Dollars (\$30,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

Notwithstanding the difficulty in assessing such damages precisely, in determining the amount of liquidated damages to be assessed the Neutral Body shall consider mitigating circumstances as it may deem relevant.

After its decision the Neutral Body will then report to the Ethics Committee the decision and the amount of the damage assessed, if any. In addition the Neutral Body may report evidence or information discovered during its investigation, but the extent of such further reporting, if any, shall be subject to absolute discretion of the Neutral Body, and in no event will the Neutral Body report the name of the complainant without consent, or report confidential information.

(5) The Ethics Committee will notify the members through the Chairman, of the decision and damages, if any, and will also at the same time instruct the Chairman to notify the respondent of the decision, ~~but only if a breach is found, -and in such case~~ and in case of a breach the respondent will be furnished with the Neutral Body report and a Conference debit note covering the liquidated damages assessed.

(g) Unquestioned Recognition of Decisions of the Neutral Body:

(1) The members agree to accept the decisions of the Neutral Body as valid, conclusive and unimpeachable, but it is understood between the members that decisions of the Neutral Body are not admissions of proof or guilt or liability under law.

(2) The members further agree that neither jointly or severally will they bring any action whatsoever against the Neutral Body or its agents for damages allegedly arising out of its acts, omissions and/or decisions as the Neutral Body. In addition each member agrees to hold the other members of the Conference and the Neutral Body and its agents harmless from any claims which may be brought by its agents or employees against another member, the Conference or the Neutral Body or its agents for damages allegedly arising out of the Neutral Body's acts or functions.

(h) Payment of Damages:

(1) The members will pay all damages duly assessed by the Neutral Body upon receipt of a debit note from the Chairman, and if not paid within thirty (30) days of receipt of the debit note, the damages will become delinquent under Article 28 of the Conference Agreement.

(2) The Neutral Body will have the power and responsibility immediately, without notice to or further authority from the Conference, to collect as agent for the Conference and by any measures recommended by legal counsel, any damages duly assessed, as soon as they become delinquent, from the deposit or substitute security submitted and maintained by the members under Article 12 of this Agreement. The Neutral Body will pay over to the Conference immediately all damages collected.

(S E R V E D)
 (MARCH 25, 1966)
 (FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 1095

AGREEMENT NO. 150-21, TRANS-PACIFIC FREIGHT CONFERENCE
 OF JAPAN AND AGREEMENT NO. 3103-17, JAPAN-ATLANTIC
 AND GULF FREIGHT CONFERENCE

Agreement No. 150-21 as modified by No. 150-29, and Agreement No. 3103-17 as modified by No. 3103-26, approved pursuant to section 15, Shipping Act, 1916.

Section 15 does not require that modifications to conference basic Agreements be adopted by unanimous vote of the parties.

George F. Galland and Amy Scupi for protestants States Marine Lines.
Charles F. Warren and John P. Meade for respondents.
Robert J. Blackwell and Roger A. McShea III as Hearing Counsel.

REPORT

BY THE COMMISSION: (John Harllee, Chairman; Ashton C. Barrett, James V. Day; Commissioners)

This proceeding which is before us upon exceptions to the Initial Decision of Examiner John Marshall is concerned with the validity of the self-policing systems of respondents, the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference.^{1/}

^{1/} The self-policing systems of both respondents are identical and are embodied in Articles 10, 12, and 25 of the basic agreements. Article 10 covers Breach of Agreement, Article 12 calls for Faithful Performance, and Article 25 establishes the Neutral Body and its procedures. For the full text of these provisions as presently approved see Appendix A.

The proceeding was originally instituted as a show cause proceeding and on October 30, 1963, we issued a report and order upholding the validity of respondents' then-proposed neutral body system. States Marine then appealed our decision to the Court of Appeals for the District of Columbia Circuit, States Marine Lines, Inc. v. Federal Maritime Commission, No. 18,227. In its brief to that Court States Marine relied heavily on a recent Supreme Court decision in Silver v. New York Stock Exchange, 373 U.S. 341 (May 20, 1963)--a case decided subsequent to oral argument in the original proceeding and not cited to us by States Marine. We nevertheless petitioned the Court to remand the case to us in order that we might reconsider our decision in the light of Silver.

In requesting the Court to remand the case to us, we indicated our intention to "vacate the existing report and order" and to reopen the proceeding to afford the parties "full opportunity to offer evidence and argument in the reopened proceeding."

The order reopening the proceeding placed in issue the approvability of proposed modifications to the respondents' basic agreements.^{2/} By subsequent order we granted a motion of States Marine to specifically include in the investigation the issue of the validity of Articles 10, 12 and 25 "as they now stand approved" in both agreements. We further amended the order reopening the proceeding to include the question of whether unanimous vote of the parties was required for modifications to agreements approved under section 15 notwithstanding that the agreement might provide for modifications by vote of a lesser majority.

^{2/} The Trans-Pacific Conference operates pursuant to Agreement No. 150. The proposed modification (No. 150-21) would amend Articles 10, 12 and 25. The Japan Atlantic & Gulf Conference operates pursuant to Agreement No. 3103. The proposed modification (No. 3103-17) would also amend Articles 10, 12 and 25 of the agreement.

Just before the close of the hearings, conference counsel sought to introduce further modifications to Articles 10 and 25 which he urged were responsive to a number of the objections made by States Marine to the then-proposed modifications. These modifications, adopted by the conferences over the objection of States Marine had been filed earlier and designated Agreement No. 150-29 and Agreement No. 3103-26. States Marine opposed their inclusion in the proceeding. The Examiner ruled that the new agreements went beyond the scope of the order of investigation insofar as the question of their approvability was concerned but admitted them solely for the purpose of showing "States Marines motivation" in protesting approval of the agreements. The Examiner closed the record and respondents thereafter moved the Commission to amend the order of investigation to include the new agreements. We denied the motion stating in our order of March 31, 1965:

Of course, there is nothing to preclude counsel for the conference from setting forth in their briefs any proposals for modification of the contested clauses which alleviate the dispute between the parties.

Our decision in Docket 1095 will resolve the issues between States Marine and the conferences as to what the conferences self-policing provisions may and should include and all proposals by counsel for the parties will be considered.

The Examiner quite correctly interpreted the above "to constitute assurance to respondent conferences that any proposals for modification of contested provisions which alleviate the disputes between the parties will be considered." The Examiner accordingly considered the proposed modifications in his initial decision.

FACTS

This proceeding is the outcome of several years of controversy between protestant States Marine and the two respondent conferences,

Trans-Pacific Freight Conference of Japan (Trans-Pacific) and Japan-Atlantic & Gulf Freight Conference (JAG). States Marine is a member of both conferences, one of which serves Pacific Coast ports and the other of which serves Atlantic and Gulf Coast ports of North America inbound from Japan.^{3/}

It is helpful to review the events which led to the present proceeding.

In the early 1950's extreme competition in these trades resulted in a rash of malpractices and caused instability in the trade. To combat this, Trans-Pacific in 1958 held a meeting in Hakone, Japan, to initiate a neutral body self-policing system to investigate complaints alleging malpractices by member lines, and to assess fines therefor. Article 25 of the conference's agreement was the result.

The international accounting firm of Lowe, Bingham & Thomsons (Lowe) was retained to serve as the original Neutral Body. States Marine subscribed to the conference's agreement with Lowe. Lowe was chosen because it possessed desired qualifications such as international connections, accounting expertise, and professional character.^{4/}

Lowe, in performance of its duties as Neutral Body, sought in 1959 to investigate a complaint against States Marine. The complaint alleged that States Marine had granted Japanese mandarin orange shippers free passage from San Francisco to Japan. In January of 1959 Lowe representatives visited States Marine's Tokyo office to investigate the complaint. Evidence of a request for free passage was found but there was no indication that it had in fact been honored.

^{3/} The Trans-Pacific conference with 20 members serves the trade from Japan, Korea and Okinawa to United States and Canadian Pacific Coast ports. The Japan-Atlantic and Gulf conference with 15 members serves the trade from Japan, Korea and Okinawa to Atlantic and Gulf ports of North America.

^{4/} JAG also retained Lowe under an identical "Neutral Body" system.

Subsequently, on three occasions in the course of its attempts to investigate the complaint, Lowe tried to obtain records from the New York office of States Marine or its subsidiary Isthmian Lines, Inc. Each time the party seeking the documents was Price, Waterhouse and Co. (Price), acting under the direction of Lowe. Price is the New York correspondent of Lowe. Later developments disclosed that Price is also the regular auditor of United States Lines Co. which is a member of Trans-Pacific and a competitor of States Marine and Isthmian in that trade.

When Price first sought access to States Marine's records, States Marine proposed that its own regular auditors make the investigation under the directions of Price. Price rejected this offer and States Marine thereupon refused to allow Price access to the records. The Neutral Body levied a fine of \$10,000 (maximum fine for first offense) on States Marine for refusing access, a breach of the neutral body agreement.

States Marine objected to the fine, and alleged that Lowe was not qualified to serve under the Neutral Body agreement because of the affiliation of its correspondent Price with United States Lines, a conference member. States Marine filed a complaint with the Commission (Docket 920).

While the proceeding in Docket 920 was pending, Price again sought access to States Marine's records. States Marine again refused and was fined an additional \$15,000 (maximum fine for second offense). States Marine again objected and filed a second complaint with the Commission (Docket 920-1).

Price made a third attempt to gain information about the mandarin orange shipment, this time seeking to investigate the records of Isthmian, a wholly owned subsidiary of States Marine. Isthmian refused and was fined \$10,000, upon which it filed a complaint with the Commission.

The Commission in its Report and Order in Docket 920 and 920-1 found Lowe's appointment as Neutral Body to violate the neutrality require-

ments of the Neutral Body agreement insofar as the original agreement had not provided for a Neutral Body which could be affiliated with another conference line. Although Trans-Pacific subsequent to Lowe's appointment, had deleted certain neutrality requirements, the Commission found such deletion illegal as a "modification" of the agreement which was never approved by the Commission. The fines were ordered cancelled. States Marine Lines, Inc. v. Trans-Pac. Freight Conf., 7 F.M.C. 204 (1962).

On appeal by Trans-Pacific the Ninth Circuit Court of Appeals upheld the Commission. Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n, 314 F. 2d 928 (9th Cir. 1963). Neither the Commission nor the Court dealt with the question whether a Neutral Body could be lawfully affiliated with a conference member. Both merely held that Trans-Pacific had neither in its original Neutral Body system nor by approved modification provided for a Neutral Body which could be so affiliated, and therefore the appointment of Lowe was in contravention of the agreement as approved and thus in violation of section 15 of the Act.

Before the Commission issued its decision in Docket 920, Trans-Pacific and JAG respectively filed presently pending modifications (Nos. 150-21 and 3103-17) which provided that a Neutral Body must disclose any professional or financial affiliation which it has with any member line. Such affiliation, however, will not disqualify the Neutral Body from serving, unless the affiliation is with an accused line. In such a case the Neutral Body must appoint an unaffiliated agent to conduct the investigation.

Discussion and Conclusion

The Examiner would approve respondents' self-policing system as it is set forth in Agreement No. 150-21 as modified by No. 150-29 and Agreement No. 3103-17 as modified by No. 3103-26. States Marine took 18 numbered exceptions to the Examiner's decision many of which are but

restatements of others and all of which can be reduced to the following alleged errors of the Examiner insofar as he:

1. Failed to properly apply the Supreme Court's decision in Silver, supra, and concluded that respondents' agreements are unlawful thereunder--specifically with respect to right of appeal from decisions of the Neutral Body.
2. Failed to adopt States Marine's proposals regarding notice, confrontation of witnesses, weight of evidence, hearing, and notice of decision.
3. Failed to require the establishment of "criteria" for the assessment of fines.
4. Concluded that an accounting firm may serve as a Neutral Body when it serves as the regular auditor for a conference member.
5. Failed to conclude that modifications adopted by less than unanimous vote are contrary to the public interest and detrimental to the commerce of the United States in violation of section 15 of the Shipping Act, 1916.
6. Approved the present signature of the conference used in submitting proposed modifications and failed to require that conference minutes show by name the members opposed to any proposed modification.
7. Approved Agreement Nos. 150-29 and 3103-26.^{5/}

We shall deal first with the alleged error in considering the modifications embodied in Agreement Nos. 150-29 and 3103-26.

^{5/} Hearing Counsel also filed exceptions to the Initial Decision which will be discussed where appropriate in our treatment of the exceptions of States Marine.

The proposed modifications which were included in respondents' brief in accordance with our action on respondents' motion to amend the order of investigation were designed to narrow the issues for final decision by meeting certain of States Marine's objections to the Neutral Body system as it appeared in Agreement Nos. 150-21 and 3103-17. For example, a two-year period of limitation was placed on investigations in answer to States Marine's objection that the Neutral Body was free to investigate any alleged violation no matter how stale it has become through the passage of time. States Marine's argument against considering these modifications is simply that they were not in evidence and not at issue. All further discussion of the amendments merely shows that as far as States Marine is concerned the amendments do not go far enough in satisfying its objections to the system, but this is no ground for excluding them from our consideration.

Exclusion of the proposed amendments would achieve nothing more than a delay in their ultimate consideration. They have been filed with us for our approval. They raise no new issues and they cannot prejudice States Marine since they seek to remedy defects in the system alleged by States Marine itself. Moreover, our authority under section 15 of the Act is not simply the sterile power to accept or reject that which parties to agreements file with us. Section 15 expressly grants us the power to modify agreements filed with us.^{6/} Thus, even if respondents had not

^{6/} Section 15 provides in relevant part:

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

expressed their willingness to meet certain of States Marine's objections to the system by voluntarily amending their agreements, we could order them to do so as a condition precedent to our approval of the system. The only difference between the two courses of action is that the latter takes more time because we cannot force parties to accept a particular agreement--they always have the option of no agreement at all. Our situation here is much the same as that of the Federal Power Commission in Florida Economic Advis. Coun. v. Federal Power Com'n., 251 F. 2d 643 (D. C. Cir. 1957) when it granted a certificate of public convenience subject to certain curative conditions imposed after close of hearings. The petitioner claimed he would be adversely affected if not heard on these conditions. In denying the petition the Court stated, "the conditions only resolved issues raised, argued and briefed in the hearing. They involved no surprises except insofar as they may have gone further or not so far as petitioner would have wished." This contention is plainly without merit and is rejected.

States Marine next excepts to the Examiner's application of the Silver case.

Silver involved a suit by a securities dealer against the New York Stock Exchange under the antitrust laws for the concerted refusal of the Exchange's members to continue private teletype and stock ticker service to the plaintiff, a nonmember of the Exchange. The Exchange had discontinued these services and refused to tell the plaintiff the reason in spite of numerous requests by plaintiff. The Court found that, notwithstanding Silver's prompt and repeated requests, he was not informed of the charges underlying the decision to invoke the Exchange rules and was "not afforded an appropriate opportunity to explain or refute the charges" The Court stated that:

Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought

to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner. 373 U. S. 364

* * *

/N/o justification can be offered for self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position. No policy reflected in the Securities Exchange Act is, to begin with, served by denial of notice and an opportunity for hearing. 373 U.S. 361

The Examiner distinguished Silver on several factual and legal grounds. He pointed out that:

Silver was an antitrust case, this is not; States Marine is a member of both conferences, Silver was not a member of the Exchange; the Shipping Act specifically exempts agreements approved thereunder from the anti-trust laws, the Securities Exchange Act does not; the problems and considerations have to do with stock exchange self-regulation differ materially from those having to do with steamship conference self-regulation; notice and hearing, the only two specific safeguards in issue in Silver are expressly provided for under the conferences' proposed system; and States Marine chose to join the conferences thereby surrendering some sovereignty.^{7/}

Notwithstanding the legal and factual distinctions quoted above, and noting that the term "due process" is nowhere to be found in the body of the majority opinion, the Examiner found the Silver case "persuasive" insofar as it "clearly supports a requirement for 'fundamental fairness' in industrial self-policing systems, but not for the so-called defensive safeguards and techniques historically identified with constitutional due process of law."

^{7/} The Examiner noted that a practical caveat was present in any consideration of States Marine's "true freedom of choice" to operate outside the conference when and if the respondents' dual rate systems are approved and go into effect. Nonconference lines would then be largely precluded from carrying cargo of shippers signing dual rate contracts.

We agree with the Examiner's treatment of Silver and think it eminently sound. The real thrust of States Marine's argument regarding Silver is that the Neutral Body system is required to assure a conference member accused of a breach of the conference agreement virtually all the safeguards the criminal law affords a person charged with a crime. Silver clearly will not support such a proposition, and to adopt anything like it here would in our view render any self-policing system totally ineffectual and thus defeat an express statutory purpose of Congress.^{8/} Moreover, the only indication in Silver as to what type of notice and hearing should be afforded in a self-policing system is contained in footnote 17 at page 364 of the Court's opinion:

The basic nature of the rights which we hold to be required under the antitrust laws in the circumstances of today's decision is indicated by the fact that public agencies, labor unions, clubs, and other associations have, under various legal principles, all been required to afford notice, a hearing, and an opportunity to answer charges to one who is about to be denied a valuable right.

Thus, the Court makes it clear that the kind of notice, hearing and opportunity to answer charges which should be afforded is that found in "public agencies, labor unions, clubs and other associations." The procedural safeguards accorded in these institutions are not the same as those accorded a criminally accused. The association-type enterprise traditionally follows less rigid standards which, as long as they comport to the necessarily indefinite standard of fundamental fairness can be almost anything to which the members agree to be bound.

^{8/} Public Law 87-346 amended section 15 so as to empower us to disapprove a conference agreement upon a finding of inadequate policing of the obligations of the members under it. The legislative history of this amendment is replete with instances of total disregard of conference obligations by member lines and malpractices resulting from this disregard.

We think respondents' self-policing system as ultimately proposed by them meets this standard of fundamental fairness.^{9/}

States Marine, however, takes specific exception to the Examiner's conclusion regarding notice, confrontation of witnesses, weight of evidence necessary to find a violation, hearing, and notice of decision.

Right to notice. The conference's latest proposal regarding notice to a line accused of a violation provides in substance that upon receipt of a complaint the Neutral Body would have authority to call upon the members named in the complaint and without prior notice inspect records, correspondence, documents, and other materials deemed by the Neutral Body in its sole discretion to be relevant to the complaint.

After investigation the accused will be advised as to whether or not there are reasonable grounds to believe that a violation occurred. If so, he will be informed of the nature of any alleged violation and of the evidence concerning it which can be revealed without jeopardizing the confidentiality of the Neutral Body's source of information. The accused is then afforded a hearing (Article 25(b)(3)).

The Examiner found that since the proposal provides for notice and hearing before final decision, it is clearly in keeping with the standards of fairness prescribed by Silver, since Silver imposed no requirement of notice before investigation. As the conference witnesses testified, notice prior to even the investigation would facilitate the concealment of incriminating records and thus effectively frustrate the investigation. The primary purpose of notice is to inform the accused of the charges against him and to afford him an opportunity to defend himself. This should not include the opportunity to hide or conceal evidence of a malpractice. The Neutral Body upon receipt of a complaint must find evidence to support the charges

^{9/} For the full text of Articles 10, 12 and 25 as proposed in Agreements Nos. 150-21, as modified by 150-29, and 3103-17, as modified by 3103-26, see Appendix B.

contained therein if such evidence exists. The only real possible source of such evidence is the records of the accused. If there is to be any kind of workable Neutral Body system, the Neutral Body cannot be deprived access to its only source of information. It could be so deprived, however, if the Neutral Body were required to give notice to an accused prior to investigation.

Under the proposed provisions regarding notice, an accused would be afforded an adequate opportunity to defend itself, not by concealing incriminating evidence, but in the more conventional manner of offering rebutting evidence to known charges.

The proposal on notice does provide the accused with information concerning "the nature of the alleged breach and the evidence concerning it." This is sufficient to inform the accused of "why a rule is being invoked to harm him and allowing him to reply in explanation of his position." This satisfies the fundamental fairness requirements of Silver.

States Marine also objects to that portion of the notice provision stating that evidence will not be disclosed if such disclosure will result in the identification of the accuser. We will deal with this infra in conjunction with the issue of confrontation.

Confrontation. Article 25(e)(1) as last proposed by the conferences reads, "The Neutral Body will under no circumstances disclose the name of the complainant to the respondent . . . unless specifically authorized to do so by the complainant."

Article 25(f)(3) states "In so advising the respondent [of the nature of the breach] the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information."

On those points the Examiner found that fair play requires and Article 25(f)(3) anticipates, that the accused will be informed of the factual

basis of the Neutral Body's conclusions and will be afforded an adequate opportunity to reply or explain. He further found that a requirement necessitating the disclosure of the identity of the complainant would seriously cripple the Neutral Body since few complaints would then be filed.

States Marine relies on Silver and several other cases in excepting to these findings of the Examiner. The language of Silver quoted by States Marine in support of its position that confrontation and cross-examination of the accuser are required reads as follows:

In addition to the general impetus to refrain from making unsupportable accusations that is present when it is required that the basis of charges be laid bare, the explanation or rebuttal offered by the non-member will in many instances dissipate the force of the ex parte information upon which an exchange proposes to act. 373 U.S. 362.

We do not understand this statement as requiring confrontation and cross-examination of the accuser. Quite the contrary, the Court simply states that by laying bare the basis of the charges and affording the accused an opportunity of rebutting them "the force of the ex parte information" upon which the charge is made may be dissipated--not that the charge may not properly be made on the basis of ex parte information. Silver does not support States Marine's contention.

The several other cases cited by States Marine involved either criminal rights or government action against an accused and are not applicable to this type of private voluntary association.^{10/}

States Marine's desire to know the identity of the accuser must be balanced against the unwillingness of the member lines to file complaints if they are to be identified as the accuser. Their very real concern is

^{10/} States Marine relies primarily on Greene v. McElroy, 360 U.S. 474 (1959) which involves security clearance revocation by the Department of Defense and Greene v. U.S. where the same plaintiff sought damages for revocation of his security clearance.

that almost invariably the complaint will alienate a preferred shipper should the identity of the complainant be known. In our view such a requirement would render the Neutral Body system unworkable.

But both States Marine and Hearing Counsel argue that an accused will not be guaranteed that he will be confronted with all the evidence against him in view of the discretion given the Neutral Body in revealing confidential information. The Examiner correctly observed that in those instances where evidence relied upon for decision should not be shown to the accused in its original form because of undesired disclosures, it would certainly be within the "basic precepts of fair play" for the Neutral Body to go as far as it reasonably can without disclosing the identity of complainants or sources of confidential information, to inform the accused of the substance thereof as material to an adequate understanding of the charges and findings. The substance of the evidence relied upon in reaching a finding that a breach has been committed must be disclosed to the accused in sufficient detail to give him an opportunity to show that it is untrue otherwise the elements of fundamental fairness are missing.

Investigation and Hearing. The Examiner concluded that the conference proposals on these matters satisfied the requirements of Silver.

The proposals regarding investigation provide the Neutral Body with authority to investigate written complaints and in doing so to inspect and copy "correspondence, records, documents, signed written statements or oral information and/or other materials" at the offices of the member lines (Article 25(d)).

States Marine would have the investigation made by an accused line's regular auditors under the Neutral Body's direction. States Marine seeks this as a matter of convenience and to avoid exposing its confidential business affairs. Inherent in this position is the unstated and in our view unwarranted assumption that the Neutral Body will make unwarranted and unauthorized disclosures of States Marine's business affairs. We have

difficulty imagining such conduct on the part of accounting firms such as Price, Waterhouse or Lowe. There is no basis here for predicting such conduct no matter who is ultimately selected as the Neutral Body.

The conference proposals regarding hearing which were approved by the Examiner provide for notice and disclosure of evidence and, "within fifteen (15) days, or within such reasonable time thereafter . . . , if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explanations and/or rebutting evidence as it may deem proper and desirable. At such hearing the Neutral Body shall consider all of the available evidence" (Article 25(f)(3)).

In making its decision "the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead, it will employ rules of common sense . . . and the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach occurred." (Article 25(f)(2)).

States Marine's objections here are but a repeat of its objections to the provisions for disclosure of evidence. Again, States Marine urges that there can be no fair hearing or opportunity to explain when there is no guarantee that an accused will be adequately informed of the charges or of the evidence supporting such charges and again it is our view, if the accused is not sufficiently informed of the charges against him and the evidence in support thereof so as to prepare his rebuttal, the elements of fundamental fairness are missing.

Mitigating Circumstances. The latest proposed modifications to the agreements provide: "Notwithstanding the difficulty in assessing such damages precisely, in determining the amount of liquidated damages to be assessed the Neutral Body shall consider such mitigating circumstances as it may deem relevant." (Article 25(f)(4)). The Examiner approved this language.

States Marine argues that such a standard is inadequate; that due process requires specific criteria (such as whether the violation was purposely committed, whether it is a first offense, whether it is also a violation of law, etc.) to be followed in determining the nature of the fine. Hearing Counsel feel that the agreement should be amended to provide a gradation of fines based on gravity of offense. The Examiner correctly concluded that there is no evident basis for anticipating that the Neutral Body will not exercise fundamental fairness in determining and considering such mitigating circumstances as may be reasonably determinable and relevant in each case. But as evidence that the Neutral Body does not exercise fairness in such matters, States Marine offers the fines assessed against it and subsequently invalidated in Docket 920. In each instance the maximum fine was assessed. To begin with, the fines were invalidated not because the amounts were unreasonable but because the appointment of the Neutral Body itself was not in conformity with the conference's basic agreement. Moreover, we cannot say that the maximum penalty allowed is unwarranted for a refusal to allow the Neutral Body access to company records. We do not find the instances of other fines by other Neutral Bodies in other conferences persuasive here.

Neutrality. Under the presently approved system the conferences appoint a Neutral Body from responsible accountants or other persons. The appointee may not be employed by nor financially interested in any party to the basic agreement. The conference's latest proposed system provides for the appointment of an impartial, independent person, firm, or organization, subject to disclosure to the conference of any professional, business or financial interest it may have, then or later, with any member line. In the event of a complaint against a member with which it has any such interest, the Neutral Body would have to disqualify itself and appoint a substitute agent having no such interest. Any financial interest in any member line, however, will defeat appointment and if acquired after

appointment will be disqualifying (Article 25(a)). The Examiner approved the latest proposal, thereby authorizing the Neutral Body to be professionally affiliated with any conference member (including the complaining line) other than the accused.

States Marine excepts to this finding. It feels a Neutral Body which has an affiliation with any member line, especially with the complaining line, cannot be neutral so as to be able to sit and judge objectively and without bias. States Marine urges the time honored proposition that any person or body sitting in judgment, be it called judge, arbitrator or referee, etc., must be free from all bias or interest in the outcome of the case. Hearing Counsel feel that to be consistent any interest in either the accused or the complainant should be disqualifying. Be that as it may, we do not agree that being under contract to perform professional auditing services of a member line of the conference other than the accused gives the Neutral Body an interest such as would disqualify it.

Mr. Ralph S. Johns, Chairman of the Ethics Committee of the American Institute of Certified Public Accountants, testified that proposed Article 25 was not inconsistent or incompatible with the Code of Ethics of the Institute and that a member's affiliation with a complainant would not impair its independence. Johns pointed out by way of emphasis, that "It is a common situation among the larger accounting firms to serve two or more competing enterprises and in my own personal experience in Chicago not only do we, as the same firm, serve the two largest farm implements corporations, but we serve them right out of the same office and we have done so for over 50 years." We think the Examiner was correct when, after a summary of the testimony, he stated:

In view of the fact that the Neutral Body functions are fact finding rather than judicial; that the conclusive facts are usually, if not always, obtained from the books of account and records of the accused; that accounting firms are uniquely qualified both professionally and by procedural and ethical standards, to perform

this work; that fees are paid on the basis of time devoted to a case, and without regard to whether the complaint of malpractice is sustained or dismissed; that there is no evidence of actual bias or non-neutrality relating to any of the firms heretofore used; and that the application of unduly broad exclusions will disqualify or bring about the disinterest of most, if not all, of the otherwise eligible firms, thereby destroying this self-policing system, contrary to the public interest and to the detriment of commerce, it is found that a Neutral Body should not be disqualified because of a disclosed business relationship, i.e. independent contractor for professional or business services, with a conference member line other than the accused.

States Marine offers nothing on exceptions which would affect the Examiner's findings with which we agree.

Right to Appeal. Neither the presently approved nor the latest proposed modifications to the agreements contain any provision for appeal from the Neutral Body's decision. The latest proposal states that "the members agree to accept the decisions of the Neutral Body as valid, conclusive, and unimpeachable." (Article 25(g)).

The Examiner found that provision for the right to appeal to arbitration would not be necessary for approval of the self-policing systems.

States Marine in exceptions contends that the Silver doctrine of "due process fairness" requires provision for appeal from the Neutral Body's decision to an arbitration panel; the fees and expenses of the arbitrators being paid by the conference. They believe appeal is necessary to prevent "run-a-way decisions by a neutral body."

Hearing Counsel consider the right to arbitration to be desirable as a double check on arbitrary action.

An appeal is, of course, not required by law. Where a federal statute denied an appeal of Tax Court determinations in renegotiation cases, the Ninth Circuit Court of Appeals in French v. War Contracts

Price Adjustment Board, 182 F.2d 560 at 565 (1950) rejected a contention of unconstitutionality, concluding " . . . that there is no constitutional right of appeal is well phrased in Luckenbach Steamship Co. v. United States, 1926, 272 U.S. 533 at 536 . . . 'the well-settled rule applies that an appellate review is not essential to due process of law, but is a matter of grace.'"

The testimony of record demonstrates why appeal would render the self-policing system ineffective. It would cause delays and is unnecessary since the Neutral Body is better qualified to decide than a panel of arbitrators. Disclosure of the identity of the complaining line would result from resort to arbitration. Some of the candidates for the Neutral Body position indicated they would not serve if their decisions were to be subject to appeal.

Since the law does not require appeal and since other reasons exist for not requiring appeal, we find that it is unnecessary to have such a provision in this Neutral Body agreement.

Knowledge of Acquittal. States Marine opposed the original proposals because they contained no provision for notice of acquittal to an accused. The conferences' latest proposal provides for notice in the event of either acquittal or conviction. The Examiner approved this latest proposal. States Marine does not object to the substance of the provision, but has doubts as to whether it was properly before the Examiner for consideration. We have found that the Examiner's consideration of these proposals was proper. We also find the Examiner's approval of the provision for notice of acquittal as well as conviction was well founded and proper and it is upheld.

Unanimity. The percent voting requirements of the respondent conferences are set forth in Articles 18 and 19 of the basic agreements. They provide that four-fifths of all parties entitled to vote constitute a quorum when

changes in the basic agreement are being considered. Once a four-fifths quorum is present, all parties agree to be bound by changes made with the consent of two-thirds of all parties entitled to vote.

Throughout this proceeding States Marine has contended that section 15 requires that such modifications to the conference agreement can only be approved upon unanimous adoption by all members of the conference. Accordingly, they contend that the Neutral Body proposals in question here cannot be approved since States Marine has not endorsed them.

The Examiner found that a unanimous vote is not required, and States Marine takes exceptions thereto. The contention is that a non-unanimous amendment rule has been contrary to the public interest and has operated to the detriment of the commerce of the United States in violation of section 15. States Marine, in support of this contention, maintains that the present rule has caused a high co-efficient of friction in the conferences, that it makes it impossible for States Marine to retain control over its own business and corporate affairs, and that it pledges the company to adhere to contracts never formulated by its management.

In our previous Report we said:

States Marine contends that notwithstanding the language of Articles 18 and 19, a modification of the basic agreement without unanimous consent of the parties alters the contractual relations of the dissentient parties contrary to the principles of contract law and is thus invalid. States Marine argues, in an attempt to avoid its obligations under Articles 18 and 19, that because it was not among the original organizers of the respective conferences and had no part in the formulation of their basic agreements it remains free to attack those portions of the agreements which it considers improper. For States Marine to prevail, some provision of section 15 must render the voting requirements of Articles

18 and 19 invalid, for if they are valid States Marine as a subscriber to the agreement is bound thereby.

In attempting to show that the voting requirements are invalid States Marine attempts to draw analogies from the field of private contract law. We think these analogies improper. Private contracts, normally between two parties, cannot reasonably be equated with agreements approved under section 15. An agreement providing for the organization of a conference to operate in our foreign commerce is of necessity an agreement which attempts to reconcile a number of divergent interests insofar as is consistent with Congressional policy and the public interest in the free flow of our foreign commerce. Such an agreement must provide for the continuing commercial operations of a relatively large number of conference members with as little friction and obstruction as possible. The very heart of such an agreement is that each individual line relinquishes some of its freedom of action, in exchange for the benefits resulting from participation in the conference arrangement.^{2/}

This concept of majority rule is not uncommon in the ocean freight industry. A good many agreements on file with the Commission provide for the modification thereof by a stated majority. We do not consider it unreasonable for a conference to make such a provision in its basic agreement, provided it is not applied so as to contravene the standards of section 15. We find nothing in the concept of majority rule as applied to the proposed modifications here under consideration which renders it discriminatory as between carriers or shippers, detrimental to the commerce of the United States, contrary to the public interest or otherwise contrary to the requirements of section 15. States Marine

^{2/} This is by no means a novel relationship. Analogous situations pervade our political, economic and social structure. Just one example in the economic sphere is found in corporate organizations. A corporation can make fundamental changes in its charter, changing the very nature of the corporate business, and most states require only that the consent of two-thirds or three-fourths of the stockholders be given to this change. The dissenting stockholder must either bow to the will of the majority, or sell his stock. The latter alternative is, in effect, resignation from the corporation.

in accepting membership in the respondent conferences has bound itself to the terms of the basic agreement, and so long as it chooses to remain a member it must conform to all modifications thereto which are regularly made and only duly approved by the Commission

States Marine has offered nothing which causes us to change our views as expressed above. We would only add that in our view unanimity could well work to increase rather than decrease friction among the members of the conferences. The record here clearly demonstrates that if the respondent conferences each had the unanimity rule, there would be no Neutral Body system presently before us for approval. Therefore, the respondents' attempts to satisfy their statutory obligations to adequately police their obligations under the respective agreements would be frustrated. Such a result would of course be contrary to public interest and detrimental to commerce within the meaning of section 15.

There remains States Marine's objection to the way in which modifications to the agreements are subscribed to by the conference chairman. The conference chairman executes a standard form of subscription in submitting proposal agreement modifications to the Commission for approval. This form provides:

IN WITNESS WHEREOF the [conference], the members of which are all hereinafter listed, has authorized the foregoing amendments by resolution passed at its regular conference meeting held _____, 19____, in Tokyo, Japan.

There follows a typed list of the membership and the signature of the conference chairman as such. States Marine contends that this creates "a record which on its face is misleading, a half truth, and may be utterly false" in that the signature of the conference chairman on behalf of the entire membership implies that the modification was carried unanimously.

We agree with the Examiner's finding that this contention is without merit. He stated:

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In attempting to show that the voting requirements are invalid States Marine attempts to draw analogies from the field of private contract law. We think these analogies improper. Private contracts, normally between two parties, cannot reasonably be equated with agreements approved under section 15. An agreement providing for the organization of a conference to operate in our foreign commerce is of necessity an agreement which attempts to reconcile a number of divergent interests insofar as is consistent with Congressional policy and the public interest in the free flow of our foreign commerce. Such an agreement must provide for the continuing commercial operations of a relatively large number of conference members with as little friction and obstruction as possible. The very heart of such an agreement is that each individual line relinquishes some of its freedom of action, in exchange for the benefits resulting from participation in the conference arrangement.^{2/}

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We agree with the Examiner's finding that this contention is without merit. He stated:

Conference chairmen are merely accomplishing the ministerial function of filing duly adopted modifications on behalf of the conference and in so doing are listing the lines currently holding memberships, all of whom are bound by the modifications. Such listing has nothing whatever to do with a vote tally or representation of unanimity. Both the Commission and the individual member lines are on direct notice that under the provisions of Articles 18 and 19, supra, resolutions referred to in the standard form require the affirmative vote of only two-thirds majority. On this record, it cannot be found that the form is actually misleading or otherwise in violation of the Act.

Since States Marine's objections to the proposed Neutral Body systems here under scrutiny are based almost exclusively upon the Supreme Court's decision in the Silver Case, our discussion of them has been primarily concerned with the applicability of the Silver standards to the systems. What we have said makes it clear that the proposed systems are fully in accord with the standards of Silver insofar as they can be said to be applicable to industry's self-policing agreements under the Shipping Act. More importantly, we think it equally clear that the proposed systems are fully in accord with the standards and requirements of section 15, and should enable respondent conferences to satisfy their responsibility to police adequately their obligations under their respective agreements. There is nothing in this record to show that the systems will in any way operate in a manner which would be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign counterparts, or detrimental to the commerce of the United States, or contrary to the public interest, or in violation of the Shipping Act.

Vice Chairman John S. Patterson, dissenting:

This case is before the Commission for the second time because the United States Circuit Court of Appeals for the District of Columbia

granted our petition to remand our first report and order of October 30, 1963, shortly after the intervenors herein had appealed our order as authorized by the Review Act of 1950, but before a final adjudication by the Court of Appeals. Our petition acknowledged that our decision was made without considering a recent Supreme Court precedent in Silver v. New York Stock Exchange, 373 U.S. 341 (1963) (herein referred to as "Silver"), and we expressed a desire to reopen and reconsider this case in the "light of Silver". The Silver case held the New York Stock Exchange did not have the power to deny private teletype and stock quotation "ticker" service to a non-member broker without first according fair procedures pursuant to self-regulation rules of the Stock Exchange authorized under the Securities Exchange Act.

After the remand ordered March 16, 1964, we vacated our first report and order. Additional hearings before an Examiner were ordered and completed, followed by a decision by an Examiner concluding that the agreements should be approved. Exceptions were filed.

The purpose of the entire proceedings is to adjudicate whether the two agreements which contain similar provisions should be disapproved in response to the protests of the intervenors. The protested provisions relate to procedures for policing the obligations under the agreements. The purpose of this particular phase of the proceeding is to rule on the exceptions and then to decide whether or not the Examiner was in error in approving the agreements.

Dissent is made to the preceding decision and to its rulings on the exceptions for the reasons:

First, there has been a failure to decide in conformity with changed conditions in law requiring modified actions as we represented to the Court of Appeals in our petition. The agreements should be disapproved.

Second, the agreements considered by the Examiner and subject of the rulings are not part of the record herein and are not subjects of this proceeding.

A. We have before us eighteen exceptions by intervenors and two exceptions by Hearing Counsel to the Examiner's initial decision approving, pursuant to Section 15 of the Shipping Act, 1916 (Act), Agreements Nos. 150-29 and 3103 and 3103-26, instead of Nos. 150-21 and 3103-17 which were before the Court of Appeals and which were approved in our first report. Agreements Nos. 150-29 and 3103-26 were the subject of our order titled "Denial of Motion to Amend Order Reopening Proceeding", denying, on March 31, 1965, a motion to amend the order reopening the proceeding after the record had been closed and the hearings concluded on March 3, 1965. The denied motion was for the purpose of making "these revised self-policing provisions" in Agreements Nos. 150-29 and 3103-26 a part of the record. Therefore, my rulings on the exceptions are confined to the question of approval or disapproval for adequacy of self-policing provisions of Agreements Nos. 150-21 and 3103-17 which are part of the record.

B. Based on the record before me in this proceeding, my conclusions are that Agreements Nos. 150-21 and 3103-17 should be disapproved because after notice and hearing it is found Agreements Nos. 150-21 and 3103-17 contain inadequate policing under the obligations of the previously approved Agreements Nos. 150 and 3103, contrary to the requirements of the third paragraph of section 15 of the Act.

C. My conclusions result from the following proposed rulings. These rulings apply to the numbered exceptions of each party as stated by them and set forth in Appendix C hereto. Intervenors' exceptions 1 through 7 and 12 through 17 should be sustained. Intervenors' exceptions 8 through 11 and 18 and both of Hearing Counsel's exceptions should be rejected.

D. As regards my conclusions and proposed rulings, the reasons in support of them and for my decision are advanced in the following discussion.

The facts consist entirely of the agreements subject to the applications for approval in the first hearing, and "affidavits and memoranda, replies thereto and oral argument" pursuant to the terms of our order served March 14, 1963, and in the second hearing testimony and exhibits pursuant to the terms of our order served April 3, 1964, as amended to expand the issues to be resolved. Agreements Nos. 150-29 and 3103-26 were never subject either to hearing or to cross-examination.

The two agreements subject of this proceeding are between common carriers by water in foreign commerce associated as the conferences identified above and respondents herein. The purpose of the agreements is to establish a procedure for policing the obligations under the agreements. The procedures for policing the obligations were in amendments of the agreements (Agreements Nos. 150-21 and 3103-17) which we are required to approve or disapprove pursuant to the directive in the third paragraph of section 15 of the Act, pertinent portions of which have been underscored:

"The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints."

The issue underlying all others is the adequacy or inadequacy of the provisions for policing of the obligations under the agreements proposed by the respondents. Before this issue may be decided we have to know which two out of the four agreements presented to the Commission one way or another are to be reviewed for adequacy. The Examiner considered he had Agreements Nos. 150-29 and 3103-26 before him for review. On the other hand, I consider I have Agreements Nos. 150-21 and 3103-17 before me.

The latter agreements are located in Exhibits 1 and 2 and consist of identical provisions in Article 10 titled "Breach of Agreement", Article 12 titled "Faithful Performance", and Article titled "Neutral Body", which amend or modify the first approved agreements of respondent conferences. Only the provisions of Article 25 are questioned or challenged as to adequacy.

Exclusion of the proposed amendments (i.e., Agreements Nos. 150-29 and 3103-26), it is stated, would achieve nothing more than a delay in their ultimate consideration and there is "no ground for excluding them [the undeleted provisions of Appendix B containing the provisions of Nos. 150-29 and 3103-26] from our consideration." There are, to the contrary, both reasons for delay and grounds for exclusion. The reasons for delay are that intervenors will be given their presently denied opportunity, because the agreements were submitted after the record was closed, to furnish evidence, cross examine, and argue against adequacy and approval. Such opportunity founded on rights to be heard may not be denied for reasons of expediency. The grounds for exclusion are that we have already excluded Agreements Nos. 150-29 and 3103-26 by our order served on March 31, 1965. We have not issued any order opening the record for their admission. The latter agreements may not at the same time be excluded by order and included by considering and approving them anyway. If adequacy is found, the agreements must have been reviewed and considered; and, to review, the agreements must have been read. We may only read and pass on what is in the record. The Examiner has obviously read and passed on the excluded non-record evidence. No matter how justifiable such reading may seem to avoid delay or how unfair disregard of improvements or comparisons may seem on second thought, we may only make decisions upon material issues of fact presented on the record if we are to obey section 8 of the Administrative Procedure Act. I elect to obey this section.

Perhaps exclusion of the proposed amendments may be thought to be precluded because we invited respondents to set forth "in their briefs any proposals for modifications of the contested clauses which alleviate the

disputes between the parties". These agreements with higher numbers, however, are being approved as new agreements in the record, not as modifications proposed and imposed by the Commission. Any such invitation would also misconceive our objective when we adjudicate approvability of agreements. We are approving and disapproving agreements and we are not alleviating disputes. Agreements come into the record because they are admitted by an Examiner as evidence subject to cross-examination and argument before disapproval, rather than as proposals to "alleviate" disputes. Neither are agreements automatically in the record by filing with the staff. The Commission is finding adequacy or inadequacy and thereafter adjudicating approval or disapproval. Any other objective deprives intervenors of serious rights, and we should delay as long as necessary to accord them their rights.

It should be clear that both the subject the Examiner and I are reviewing and the objective the Examiner and I are trying to accomplish are entirely different. For these reasons, the first exception to Examiner's approval of Agreements Nos. 150-29 and 3103-26, when the modifications therein were not in evidence as a result of a Commission denial of a motion to reopen the record to consider them, should be sustained.

The next step is to find out whether the agreements in the record have adequate or inadequate self-policing provisions. We must compare the standards for self-regulation in the Silver case as we said we would do in our representations to the Court of Appeals in our remand petition. Our petition referred to our Rules of Practice and Procedure, Rule 16(a), stating the Commission might reopen and reconsider and may modify a report or order if such action is found to be required "by changed conditions in fact or law". The expression "self-regulation" in the Silver case applied to Stock Exchange regulations is the same as "policing the obligations" in section 15 of the Act applied to conference agreement provisions. As a result changed conditions in law have been shown requiring a change in my earlier conclusions.

The agreements herein have been approved in spite of the disclosure that the Silver case changed conditions in law applicable to self-regulation of the Stock Exchange which must now be applied as an interpretation of the Act before a conclusion of adequacy or inadequacy of the policing provisions may be reached. In discussion of later exceptions, I find the agreements violate two of these new standards, which are now law, in addition to the existing findings supporting lack of fundamental fairness as stated in my dissent to the Commission's Report in this docket served October 30, 1963 (8 FMC ____, beginning p. ____). For these reasons the agreements are found to violate the new laws for industry self-regulation, and the second exception should be sustained.

Correct consideration of this case in the light of the new standards in the Silver case requires more than a comparison and a finding of non-applicability based on distinctions and arguments alone.

The Examiner's "treatment" of Silver is thought to be "eminently sound". My difficulty with the soundness of the treatment is that the distinctions and arguments all existed at the time the earlier remanded report was being reviewed by the Court of Appeals. All the distinctions and arguments might have been presented to the judges at that time without asking for the remand. A representation serious enough to induce a court to remand a case to us for more expensive and time-consuming adjudication ought to involve some new discoveries and a shift of position rather than the pre-appeal decision reached once again by now finding that the law of the precedent either does not apply, or to the extent the new law applies the respondents' self-policing system "meets the standard of fundamental fairness: and is presumably adequate. The reasons assigned to justify the remand, for better or for worse, completely changed the comparisons to be made, and it is too late to act as though our representations about changed conditions in law in Silver do not change anything else. The Commission is committed to considering the changes seriously. We could not foresee what was to come, nor prejudge, but at the time I believed we had the serious purpose of applying the precedent. I am attempting to give such consideration and application, as I indicate herein, because we chose not to take up

the opportunities to argue when we were subject to the Court's judgment and elected to use the opportunities only when we got the case back subject to our judgment. One must now get on with this assignment. Accordingly, it is believed I must not only disagree with the treatment of the Silver case, but must reconsider my own position in my previous dissent.

Section 15, as amended by Public Law 87-346 in 1961 to add the third paragraph, establishes as a principle that self-policing is a governmentally recognized method of enforcing conference agreements. Given such a principle, the consequences to government policing must be that short of displacing government enforcement of laws, some displacement of Commission concern with enforcement of conference agreement obligations affecting conformity with the Act is inevitable. Loss of protection to the public caused by any displacement may be restored by assurance of fair procedures in administering a self-policing plan. To me, this is the lesson of or the "light" cast by the Silver precedent. Stated in other words, equally applicable to the third paragraph of section 15, the Supreme Court wrote:

"Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner." 373 US 341 (1963) at p. 364.

Whatever may have existed before, a fundamentally unfair manner is now equivalent to inadequacy. We protect the public when we assure adequate procedures.

I do not believe, however, that what is fundamentally fair for the New York Stock Exchange operating in conformity with the Securities Exchange Act for the purpose of protecting licensees and promoting fair dealings among Exchange members within the United States is to be regarded as an imperative for ocean freight rate-fixing conferences operating in conformity with the Shipping Act for the purpose of protecting shippers and carriers under the traditions of international shipping. Nevertheless,

some concessions to public protection are necessary to achieve fundamental fairness. For the reason that the Examiner made no concession to public protection beyond what existed before, there has been a failure to apply standards, and the failure amounts to an incorrect consideration of this case in the light of Silver in line with our petition, and the third exception should be sustained.

Procedural safeguards established under Agreements Nos. 150-21 and 3103-17 for shipping conferences may differ from those for securities exchanges and be less sophisticated and exacting because carriers are dealing with each other. Also, procedural requirements derived from our own jurisprudence need not guide impositions on conference members, most of whom are nationals of countries where traditions are not the same as ours. The jurisprudence of which official notice may be taken in many conference member nations is inquisitorial rather than adversary in nature, and adequacy of self-policing procedures may take this factor into account. The possibility of international retaliatory regulation, not present in national securities exchange regulation, also argues for restraint in imposing our traditions. The differing subjects of regulation, the less sophisticated conference procedures, differing traditions of jurisprudence among those to be regulated, and other international considerations dictating restraint are all factors which justify minimum procedural requirements to achieve fundamental fairness as qualification of adequacy. It is concluded that, to restore assurance of public protection and avoid inadequacy, at least some, but not all, of the argued-for procedural safeguards of Silver are required. For these reasons the fourth exception to the Examiner's conclusion, that Agreements Nos. 150-21 and 3103-17 establish a fundamentally fair system of industry self-regulation within the meaning of Silver when none of the procedural safeguards specifically named are provided, should be sustained.

Without findings of fact and only with arguments, the Examiner approved agreements without procedures for giving an accused carrier

(1) notice of complaint, (2) opportunity to confront, (3) the evidence used to reach decisions, (4) a hearing (including if essential cross-examination) before a decision, and (5) notice of the decision, including a specification of the charges found proved and those found unproved as urged by the intervenors. The agreements approved were not in the record. If the above five standards do not apply to the record agreements, we ought to know what facts or other argued considerations cause the standards not to be applicable. Intervenors supplied quite a few facts which they argued showed inadequacy, detriments to commerce, and absence of public interest if all the standards were not found applicable. Parties are entitled to a refutation based on factual findings. If the findings are absent the conclusions may not be made. The fifth exception as to conclusions despite lack of findings of fact on the agreements in issue should be sustained.

The sixth exception, together with my ruling on the fourth exception, leads to a question of what standards must be applied to agreements as tests of adequacy. It has already been decided above that some but not all of the proposed procedural safeguards must be applied and that it is error to apply none of them. Which particular ones apply depend on practicalities and circumstances of international ocean shipping traditions.

The essential basis for fundamentally fair procedures is to encourage discovery of as much of the truth about a commercial transaction as is possible so that a truly neutral judge may know most of what is relevant for deciding who is right and who is wrong after a complaint of malpractices. Fair procedure is not a ritual for the benefit of disputants, nor an assurance of personal "rights", but is a practical means for helping out a truly neutral adjudicator. The new tests need not have anything to do with "due process" observed by courts nor with distinctions between criminal and civil jurisprudence. If they are simply practical aids to truth finding, they are adequate for policing

the obligations. A system providing only for a power referee would be inadequate. Almost any procedures, varying from conference to conference, that facilitate disclosure should meet the Silver standards of fairness as tests of adequacy.

Applied to the five proposed tests, these considerations lead to choosing notice of complaint, disclosure of evidence used to reach a decision, and a hearing of some sort before decision. Neither confrontation nor notice of decision are necessary, although the latter would seem to be reasonable and not be a controversial point. Disclosure of evidence and hearing with cross-examination might all be at the same time and place after preparation and might occur in the presence of the adjudicator. The notice and hearing (including disclosure of evidence) are essential to provide an opportunity to answer charges by one who is about to be deprived of valuable commercial privileges or fined.

In the subject agreements, Article 25 contains eight sub-articles (a) through (h). Of these none provides for notice, and the closest they get to notification is a power given the neutral body "to call upon a member or its agents at any of their offices during office hours and inspect . . . " etc. Sub-article (f) refers to a "hearing for the respondent" in the title, but this phase occurs, if it can be called a "hearing", "on concluding its investigation" and after the body decides "in its absolute discretion whether the facts . . . constitute a breach . . . ", but the promise of the title is barely kept because the respondent is allowed, after arrival at a "tentative decision", if requested by respondent, to meet with the neutral body and offer explanations. The privileges offered are too late and too little. The "neutral body" is in effect the adjudicator. The purpose of a notice is to give the accused the opportunity to bring in all the proof he has to support whatever he has done or to refute what is claimed he did. Obviously, the accused will be motivated by a desire to defend himself and will at least produce some facts in his favor which would be useful to the adjudicator. It is equally to be

assumed the complainer will already have produced what supports his case. A hearing procedure will assure that the adversaries will provide the adjudicator with a large number of facts. Notice is an essential practical move, at least to start the fact assembling process, and the notice should be at the earliest possible time to be useful, and certainly before any decision is made. To the extent the agreements before us for approval contain no notice provision or any agreement delays notice until after a decision, they should be disapproved as inadequate if the lessons of the Silver case are to be taken seriously.

Confrontation does not seem essential because commercial transactions of the type involved in malpractices are largely documented, involve payments and measurements, and tend to be impersonal. Secret unsupportable accusations and wrongs of a civil or criminal nature where various states of mind are material are less apt to occur in commercial transactions, and malice, vindictiveness, intolerance, prejudice, or jealousy are less apt to be present. The fact that conference agreements are formulated by carriers of many nationalities from a diversity of legal systems does not preclude application of the lessons of the Silver case, even under a policy of restraint and minimal standards. The truth is discoverable without confrontation or even disclosure of the identity of the complainer consistently with adequacy.

Investigation and hearing are essential from the adjudicator's point of view for the purpose of adding to or explaining the facts previously supplied by the complainer and the accused. During this stage, both sides may reply with other facts and the adjudicator as an auditor or accountant may go out and assemble business records. A procedure such as that in Article 25, which does not make explicit where the evidence must come from, in this regard is inadequate. The adjudicator may, consistently with a hearing procedure as I envision it, simply meet with the parties to allow them to offer explanations or further answering

evidence which the adjudicator should then consider and thereafter decide on whether it proves a malpractice or not.

A combination of adversary and inquisitorial procedures having in rudimentary form and simple terms at least the above two elements would satisfy adequacy requirements of section 15 of the Act qualified by the Silver decision.

To the extent my dissent in the earlier proceeding approved use of procedures without the elements of notice and hearing, it has been reconsidered and revised by the foregoing in response to what is thought to be the Commission's commitment to the Court of Appeals.

To the extent the Examiner fails to find policing of the obligations inadequate under the standards of the Silver precedent as related to notice and hearing, the sixth exception should be sustained; and, to the extent the Examiner fails to adopt proposals for modification to include the new standards of adequacy in the subject agreements, the seventh exception should be sustained. No need is found for passing on that part of Exception 6 questioning whether the self-policing systems operate to the detriment of the commerce or are contrary to the public interest.

Exceptions 8, 9, 10, and 11 deal with failures to find, consider, or recommend agreement provisions relating to criteria for assessment of fines and appeal and review of neutral body decisions. The facts all deal with past abuses and oppressions by respondents, such as the imposition of maximum or disproportionate fines for refusal to reveal company files to a suspected hostile auditor, and situations potentially resulting in virtual bankruptcy of defendants by excessive fines without appellate review. The facts as to intervenors alone do not establish the necessity of an appeal as a condition to adequacy modified by fundamental fairness lessons. Past history on the facts of this case indicates some appellate restraint on a neutral body might be advisable in these particular agreements, but offsetting proposed procedural safeguards should supply the

restraint. Apart from procedures, appellate need is eliminated when added to the court-supported principle that appellate review is not an essential to due process, but is a matter of grace, and to the consideration that appeal does not improve the finding of truth but rather improves the application of law. Absence of a right to appeal or restraint on fines does not result in inadequacy. The eighth, ninth, tenth, and eleventh exceptions dealing with these subjects may be rejected.

The twelfth and thirteenth exceptions are to the Examiner's conclusions that an accounting firm employed as an auditor by a conference member line may serve as a neutral body and may consider a complaint of the member which employs it as auditor (Sub-article (a), item (2), second paragraph). The issue in both exceptions is whether it is fundamentally fair to use such a person as a neutral in any controversy and whether procedures authorizing such use are inadequate. The reasons for finding provisions of an agreement containing such procedures are inadequate are stated in my dissent in this proceeding in our first report referred to above. Such provisions do not provide a system of true neutrality. In spite of the now reasserted reasons advanced at that time, there still seems to be a misconception of the issue when the Examiner refers to professional accounting firms as being uniquely qualified both professionally and by ethical standards to perform this work. There is no question that this finding or opinion is correct, and nothing stated earlier or here questions qualifications or ethical standards. The issue, at least as I see it, is not individual professional ethics, qualifications, or conduct, but the effect of an existing business relationship on the purity of the system itself to assure true neutrality and dangers to public interest without such assurance. Any appearance of bias or favoritism must be avoided. Our concern ought to be with the tendency to corruption of decision and with the consequent erosion of public confidence. Suspicion about all decisions is the by-product of

existing provisions and the respondents no less than intervenors have much to gain by strict adherence to assured neutrality. Whatever may be said about professional behavior, the provisions allow the policing agency to have a special or closer relation to one and not to the other of two adversaries if he is the auditor of the complainer. The relation with one side unavoidably destroys assurance of siding with neither of two adversaries, an essential ingredient of the true neutrality referred to in the earlier dissent.

By missing the two points of a need for provisions assuring (1) the integrity of the system used and (2) the true neutrality of the policing body, the Examiner has not approved a fundamentally fair system of policing the obligations. For these reasons the twelfth and thirteenth exceptions to the Examiner's conclusions that an accounting firm may serve as a neutral body even though it is the regular auditor of a member line and may consider a complaint and render a decision on an accused when serving as auditor of the complainant-accuser ought to be sustained.

The fourteenth through the seventeenth exceptions are to the failure of the Examiner to find facts related to the issue of approving agreements by less than all conference members and that the facts create agreements detrimental to commerce and to the conclusion of the Examiner that such agreements may be approved when submitted in the name of all members, including those who oppose the agreement. The exceptions raise an issue as to what is an "agreement" within the meaning of section 15 of the Act. Such an issue ought to be resolved before getting to any other issue as to inadequacy of provisions.

The Examiner held in effect that agreements submitted to the Commission under section 15 may be accepted for filing and approved even though they are not signed by all of the parties to be obligated. He holds that if an earlier agreement provides that later agreements

modifying the earlier one may be amended by less than unanimous consent all of the parties are nevertheless obligated by the later modification.

The error of his position is in assuming that a change of an agreement is within the scope of the agreement. A change or amendment is inevitably outside the scope, but is nevertheless an agreement under section 15 if properly accepted. The Examiner fails to distinguish between actions within the scope of an agreement accomplished after vote and changes of the agreement itself which are to enlarge or restrict the scope. The latter require either unanimous consent or obligate at the most only those who accept the terms offered and evidence their acceptance by authorized signatures. The issue here is not one of inadequacy, but whether there is any agreement at all as described in section 15. The issue is legal, involving the law of contracts, and the best advice available convinces that a reservation by some parties to a contract of an unconditional future right to determine the nature of performance by changing the scope of the agreement makes the promise too indefinite to be enforced and the contract is not complete. (Williston, Contracts, 3rd ed., sec. 37) If agreements may be changed for all parties by less than all parties, they have no ascertainable meaning for all the parties at the time they are entered into because a later non-agreeing party has no way of knowing what his obligations are at any time during the life of the contract. The dissenter may be obligated in ways never assented to. There is no meeting of minds, no accepted offer, at the moment of agreement about what is to happen if less than all parties may change later the scope of performance. I would hold that a later agreement not accepted at the time of later change by all the parties to be obligated is an agreement only of those who accept and does not obligate those who do not accept, notwithstanding any earlier agreements to be bound by votes of other parties because the earlier agreements create an indefinite and unenforceable contract.

The foregoing is based on legal advice and may not be subject to final adjudication before this agency forum. Agreements under section 15 may not be equated with contracts known to law, but up to now it has never been necessary to resolve this issue. Accepting the premise that the courts may prove my efforts at legal opinions poorly advised, I would nevertheless hold that agreements under section 15 must show unanimous consent before they may be approved. We are not dealing with any abstract concept of majority rule either as known to political science or the management of internal association affairs. We are dealing with agreements, first, which only after approval are lawful and when lawful are excepted by the fifth paragraph of section 15 from the provisions of specified laws commonly known as the "anti-trust laws"; and, second, which both enlarge and restrict commercial relationships of all member carriers. The first creates valuable privileges to make pricing decisions free from competitive restraint, and the second substantially affects opportunities for profit by foregoing competitive opportunities. The less-than-unanimity imposition of obligations outside the scope of the initial conference agreement enables less than all the associated carriers to force a carrier against managerial judgment to engage in non-competitive activity or to be exempt from the otherwise applicable laws when a carrier's management wants to resort to competition. It is a paradoxical interpretation of section 15 to say we must accept for filing and thereafter approve an agreement compelling, rather than permitting, non-competitive activity. Considered abstractly, I wholeheartedly endorse conference association, but it should not be compelled in this manner. The less-than-unanimity rule affects opportunities as shown by testimony that intervenor's management because of its past difficulties was not "going to join or continue in a conference . . . unless we absolutely as a matter of staying in the trade, have to do it" (Tr. 414). What this means is the company found it impossible to retain control over its business and corporate affairs by

committing it to contracts not formulated by management but formulated by its competitors. Conflict among business associates likewise may affect profits. The unsupplied facts and findings by the Examiner would have shown a long history of disputation and resultant indecision (Tr. 355, 412) with the less than unanimous rule inducing non-reconciliation. The rule has provoked friction on this record.

The generalized considerations of this discussion alone may not be persuasive reasoning to support detriments to commerce and lack of public interest dictating disapproval even if a fileable agreement is proven. Combined with the facts of a long history of dissension, a conclusion of disapproval is warranted. If less than all parties may not amend an agreement, a statement at the end of an agreement that all of the members of the conference have "authorized the foregoing amendments", including in a list the names of carriers voting against the amendment, cannot be an entirely true statement. Misleading or false statements are not in the public interest and agreements containing them should be disapproved. Amending agreements are the same as an initial agreement under section 15 and ought to bear the signatures or otherwise evidence approval by all the parties to be obligated and not be signed by the secretary or some other conference official.

For these reasons exceptions fourteen, fifteen, sixteen, and seventeen dealing with failure of findings of fact relating to the issue of approval by less-than-unanimous votes; failure to find amendments adopted over a member's dissent operate to the detriment of the commerce and are contrary to public interest; the conclusion that amendments are approvable when adopted by a less-than-unanimous vote; and approval of a form of agreement submitted in the name of all members should be sustained.

The eighteenth exception to the Examiner's failure to find the minutes of conference meetings should show by name which member lines voted against the adoption of an amendment is rejected as not necessary

to a final decision in view of the prior rulings. A ruling is not required for a reasonable decision as to adequacy of policing of obligations under the agreements, nor to approvability of the agreements.

Hearing Counsel excepts (1) to the failure to find the agreements should contain certain proposed provisions and (2) to the Examiner's interpretation of a court precedent. It is not considered we are proposing desirable agreements, but are only disposing of applications for approval of agreements that have been contested. Absent any showing of inadequacy or precedents compelling disapproval of what we have before us, the proposals are irrelevant to anything we are doing. I agree with Hearing Counsel that the finding that the Examiner ought to make is related to adequacy of obligations, but our order of investigation raised the issue of whether the agreements before us should be "approved, disapproved or modified" on the premise that we must "disapprove" inadequate agreements; therefore, the Examiner's choice of rhetoric was correct, whatever he may have said about court precedents. For these reasons, Hearing Counsel's two exceptions should be rejected.

To sum up:

1. This report, unlike the decision of the Examiner,
 - a. reviews and disapproves the agreements in the record rather than agreements as modified by agreements excluded from the record; and
 - b. adjudicates approvability of agreements rather than attempts to reconcile disputes between respondents and intervenors by accepting non-record modifications.
2. The agreements reviewed are inadequate and must be disapproved because, in the light of the changed conditions in law introduced by the Silver case, the provisions for policing the obligations do not provide for:
 - a. notice of complaints, or
 - b. a hearing, including the production of evidence and opportunity to argue and explain, or
 - c. fundamentally fair procedures through true neutrality.
3. Changes in the scope of the agreements must be made by all of the parties to the agreements (i.e., by unanimous consent),
 - a. in order to be legally binding agreements, or
 - b. to be approvable under section 15 of the Act.

4. The foregoing permit rulings as follows:

- a. sustaining intervenors' exceptions 1 through 7 and 12 through 17,
- b. rejection of intervenors' exceptions 8 through 11 and 18, and
- c. rejection of Hearing Counsel's two exceptions.

To conclude:

After notice and hearing herein, Agreements Nos. 150-21 and 3103-17, for which respondents have applied for approval under section 15 of the Act, should be disapproved on a finding of inadequate policing of the obligations under the aforesaid contracts, and a finding of non-unanimous consent thereto.

Commissioner George H. Hearn, dissenting in part:

I do not subscribe to the majority view in toto.

A steamship conference, of course, is a voluntary association, a co-operative venture, and it must be grounded upon the good faith of its members, not only for the furtherance of the public good, and the protection of the shipper, but for the efficient, reasonable, practical and harmonious day to day business and commercial betterment of its members. No one will deny that procedural safeguards are granted to persons and corporate entities under the constitution, or that many fundamental rights are protected by the great body of common law; nevertheless, when a steamship line elects through the exercise of its managerial judgment to become a member of a conference, for the benefits inuring therefrom, it may contract away some of its rights and privileges for what it considers to be business expedience but it cannot agree to an abrogation of obligations cast upon the group by law. It is my opinion that certain rights and privileges which are not essential to the public interest need not be observed; on the other hand, some fundamentals which do not im-

pair the reasonable and practical day to day functions of the business need not be obviated. Here, an erosion of fundamental rights, while neither enhancing the self-policing duties nor perfecting the better flow of business of the conference, may well set a precedent for future agreements wherein important necessary and fundamental rights, as well as practices, are omitted. Therefore, I would modify the proposed self-policing agreement in several respects.

My proposed modifications, however, are not dictacted by the decision in the Silver^{1/} case which is clearly distinguishable from the instant case, the principal point being that Silver involved a non-member of the New York Stock Exchange while States Marine is a member of the conference herein.

First, the neutral body should be neutral in all respects. I am not convinced that the duties of the neutral body could not be undertaken by accountants, attorneys or men schooled in the steamship business. I do not subscribe to the theory that the calling to conference policing is so specialized that there are only a handful of qualified men able to perform the functions of a neutral body. Moreover the access to the private business operations of competitors requires, in my mind, that the neutral body conducting the investigation of alleged wrongs have no relationship with or interest in any of the activities of the members of the conference. To the extent, therefore, that the proposed amendments to these agreements permit the slightest affiliation between the conferences' neutral body and any of the members of the conference for any reason whatsoever, I would not approve them.

Second, I would not approve the agreements to the extent that they permit a neutral body to investigate, on its own motion, the business affairs of a conference member. The better view, I believe, is to permit

^{1/} Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

investigation by the self-policing organization only upon receipt of a written complaint which asserts, with some specificity, a breach of any of the obligations of the conference agreement by one of the members. A neutral body should be discouraged from going on fishing expeditions, thereby establishing the necessity for its self-perpetuation and possibly satisfying the majority of the conference members at the expense of one member. Since one of the reasons for a conference is the betterment, business-wise, of each individual member, as well as all of the members thereof, it is presumed, in theory, that they will each conduct themselves toward each other in the highest ethical traditions of the business and commercial world.

Third, I believe that reasonable notice of the gravamen of the complaint, but not the identity of accuser, should be given the accused, before the complaint is investigated, at least before the neutral body undertakes a visitation through the accused's papers, books, files, records, etc., for the alleged violation. This restraint, in my view, would limit odious harassments initiated by an unknown and disgruntled accuser.

Fourth, while I agree that the investigation should be conducted by the conference's neutral body, the agreements should make it clear that the accused has the right to have its own accountant, attorney or other representative present during the visitation, at which time the accused members' books, documents, files, etc. are reviewed for the specified breach of violation.

Fifth, the neutral body's investigation should be limited by the gravamen of the complaint. Fishing expeditions, especially those where the searcher stands to be financially rewarded, should not be encouraged. Under the proposal of the conference concerning this item, if the accused is found guilty by the neutral body, the cost of the entire investigation is assessed against the accused. In my view the conference, as the employer of the neutral body, should underwrite all of its expenses. I fear this could

at least be an involuntary instruction to the neutral body to have its investigation result in finding a violation or a breach based upon any minor technically. In my opinion the cost of the investigation should be borne by the conference, since it is incumbent upon all members to see to it that their particular conference at all times is acting in the public interest.

An order approving the agreements will be issued. By the Commission.

/s/ Thomas Lisi
Secretary

(SEAL)

APPENDIX A

10. BREACH OF AGREEMENT. (a) In the event of any violation of this agreement by any of the parties hereto and/or their respective agents, except as provided in Articles 25 and 30 hereof and as otherwise agreed upon for specific violation covered by Conference Resolution passed in conformity with the provisions of the basic agreement, such party or parties shall be subject to the payment of damages for each and every violation which shall be decided and assessed to the satisfaction of all parties hereto, except the party or parties charged with the violation, but if the party and/or parties hereto committing the alleged violation of this agreement are dissatisfied with the decision come to, such party and/or parties shall have the right to appeal, in which event the question of breach of agreement and damages shall be left to the determination of three arbitrators to be nominated within 30 days from the day on which the appeal of the party and/or parties charged with the violation will be received at the conference office.

One of the arbitrators will be nominated by two-thirds of the parties hereto, except the party or parties charged with the violation, one by the party or parties charged, the third shall be appointed in agreement of the two arbitrators so nominated. The arbitrators shall make their award friendly and the decision of two or more of the arbitrators shall be final and binding on the parties hereto. There shall be no appeal against the award of the arbitrators.

Any fine assessed by the Neutral Body under this agreement shall be paid to the conference. All conference members agree that the existing Twenty-Five Thousand Dollars (\$25,000.00) U.S.A. currency faithful performance bond already posted with the conference shall also serve as a guarantee of the faithful performance of the foregoing and of prompt payment of any fine which may accrue against any party for its acts or the acts of its agents, sub-agents, subsidiary and/or associate companies under this agreement. Fines collected under this agreement shall be used towards defraying the expenses of the Neutral Body and other expenses which may be incurred in connection therewith. The maximum fines shall be:

- a) First offense Ten Thousand Dollars (\$10,000.00) U.S.A. currency or equivalent in yen at the official mean rate of exchange.
- b) Second offense Fifteen Thousand Dollars (\$15,000.00) U.S.A. currency or equivalent in yen at the official mean rate of exchange.
- c) Third offense Twenty Thousand Dollars (\$20,000.00) U.S.A. currency or equivalent in yen at the official mean rate of exchange.
- d) Fourth offense and subsequent offenses Thirty Thousand Dollars (\$30,000.00) U.S.A. currency or equivalent in yen at the official mean rate of exchange.

(b) In addition to the payment of damages, the offending party at the option of the conference shall be liable to expulsion from the conference or suspension of voting rights for such period of time as the conference may determine. Determination in the first instance as above as to a violation of this agreement and/or of any rules, regulations or tariff provisions of the conference, and whether the penalty shall be expulsion, suspension of voting rights and/or the payments of damages, and if the latter, the amount thereof, shall be made in accordance with Article 19.

(c) In no case shall the party complained against have any vote in the determination of any of the foregoing matters. The party complained against shall have the right to be heard and to offer a defense against the accusation even though such party may not be afforded the right to vote on his guilt or innocence.

(d) No expulsion shall become effective until and unless notice thereof, with a detailed statement of the reason or reasons therefor, shall have been air-mailed or cabled to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended. Notice of suspension of voting rights pursuant to this article shall be furnished promptly by air-mail or cable to the aforementioned Governmental agency.

12. FAITHFUL PERFORMANCE. (a) As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or of any award or judgment which may be rendered against them hereunder, the parties hereto agree to deposit with the conference the sum of Twenty-five Thousand Dollars (\$25,000.00) in United States Government Bonds, or in United States currency, or security bond of like amount satisfactory to the conference, which shall be deposited or invested as may be agreed by the parties pursuant to Article 19. Any interest accruing thereon shall be for the account of the party making such deposit and shall be remitted promptly to such party if received by the conference. Each of the parties further agrees to deposit additional cash or security upon demand so as at all times to maintain cash or securities or any combination of both of a total market value equivalent in United States currency to the amount hereinabove specified. Such deposits or the proceeds thereof shall be applied to the payment of any damages imposed in accordance with Article 10 or elsewhere in this agreement, unless otherwise fully paid or previously satisfied.

(b) In the event of the termination of this agreement or the termination of membership or withdrawal of any of the parties hereto, the deposits made by the parties concerned shall be returned to them, together with any accrued interest in the possession of the conference, but only after any indebtedness to the conference has been fully satisfied.

25. NEUTRAL BODY. There shall be a Neutral Body selected and appointed by the conference from responsible accountants or other person or persons, not a party to, nor employed by or financially interested in any party to the agreement upon such terms as are agreed between the conference and the Neutral Body. The Neutral Body shall have the following powers, duties and responsibilities:

1. To receive complaints in writing from members of the conference pursuant to their obligations hereunder to report malpractices.
2. To investigate said complaints and receive evidence thereon from members of the conference or from the conference offices or otherwise.
3. To engage agents, lawyers or other experts in connection with its investigation and consideration of complaints and to pay on behalf of the conference all costs incidental to engagement and use of such agents, lawyers and other experts.
4. To have absolute discretion to decide whether or not an infringement has taken place and the conference shall have no right to

question such decision, subject to the maximum fines set forth below:

The maximum fines assessed by the Neutral Body shall be:

- a) First offense up to a maximum of U.S. \$10,000.00
- b) Second offense up to maximum of U.S. \$15,000.00
- c) Third offense up to a maximum of U.S. \$20,000.00
- d) Fourth offense and subsequent offenses up to a maximum of U.S. \$30,000.00

- 5. To report to the extent appropriate the result of its investigation to Ethics Committee but without disclosing the names of complainants. The Ethics Committee shall notify the member lines through the conference Chairman.
- 6. To give directions as to payment of fines after assessment and notification to the Ethics Committee.
- 7. The undersigned lines promise to report immediately to the Neutral Body directly any apparent or alleged deviation from the conference agreement of its rules and regulations of correct and ethical practices thereunder which come to their attention or knowledge.

All lines agree to accept the decision(s) and any assessment(s) of fines thereof by the Neutral Body as final and binding.

- 8. To enable complaints to be investigated, the conference shall make available to the Neutral Body all records, correspondence and documents of every kind wherever located and give all assistance and information whatsoever verbal or otherwise which may be required by the Neutral Body at their absolute discretion. All the records of the freight conference at the secretary's office will also be available to the Neutral Body.
- 9. The conference members jointly and severally shall indemnify the Neutral Body against any liability to third parties including employees under any libel or other action which might be brought against the Neutral Body arising from the performances of its duties under this agreement. The conference members jointly and severally shall have no right to claim against the Neutral Body or their agents in any such libel or other action.
- 10. The retainer fee and other compensation for services of the Neutral Body shall be as agreed between the member lines and the Neutral Body.

APPENDIX B

The original version is Agreement 150-21. Modifications proposed by Agreement 150-29 are indicated by crossing out (delete) and underlining (add).

Article 10. BREACH OF AGREEMENT.

~~(a) Except as provided in Articles 25 and 30 hereof and as otherwise agreed upon for specific breaches covered by Conference Resolution passed in conformity with the provisions of the basic agreement, in the event of any breach of this Agreement by a member and/or its agents, such member shall be subject to the payment of damages for each and every such breach. The determination of a breach and the amount of damages payable therefor shall be decided and assessed by vote of the Conference under Article 19 hereof; provided however that the member charged with breach shall not have a vote.~~

(a) In the event of any breach of the terms of this Agreement by a member and/or its agents, such member shall be subject to the payment of damages for each and every such breach. The determination of a breach and the amount of damages payable therefor shall be decided and assessed by vote of the Conference under Article 19 hereof; provided however that the member charged with a breach shall not have a vote; and provided further that breaches of the terms of Articles 25 and 30 and breaches involving malpractices as defined under Article 25 shall not be determined hereunder.

If the member committing the alleged breach of this Agreement is dissatisfied with the decision, such member shall have the right to appeal, in which event the questions of breach of the Agreement and damages shall be left to the determination of three arbitrators to be nominated within thirty (30) days from the date of receipt of said member's appeal at the Conference office.

One arbitrator shall be nominated by two-thirds of the members, excluding the member charged with breach, one by the member charged and the third shall be appointed by agreement of the two arbitrators so nominated. The arbitrators shall make their award by decision of two or more of them, and the award shall be final and binding on all members. There shall be no appeal against the award of the arbitrators. Nothing contained in this agreement shall interfere with the rights of any member line under the provisions of the Shipping Act, 1916, as amended, or the jurisdiction of the Federal Maritime Commission under said Act or any other pertinent Federal laws.

(b) In lieu of or in addition to the payment of damages, the offending member, at the option of the Conference, shall be subject to expulsion from the Conference or suspension of voting and other rights for such period of time as the Conference may determine. The determination of breach and assessment of the penalty of expulsion or suspension and, if suspension, the duration thereof, shall be in accordance with paragraph (a) above.

(c) In no case shall the member complained against have any vote in the determination of any of the foregoing matters. The member complained against shall have the right to be heard and to offer a defense against the allegations even though such member shall not be afforded the right to vote on the matter.

(d) No expulsion shall become effective until and unless notice thereof, with a detailed statement of the reason or reasons therefore; shall have been furnished the expelled member and a copy airmailed or cabled to the Governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended. Notice of suspension of voting rights pursuant to this Article shall be furnished promptly by air mail or cable to the aforementioned Governmental agency.

Article 12. FAITHFUL PERFORMANCE.

(a) As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or any award of the Neutral Body or any other award of judgment which may be rendered against them hereunder, the members agree to post and maintain with the conference the sum of Twenty-Five Thousand Dollars (\$25,000.00) in United States currency or United States Government Bonds, which shall be deposited or invested as may be agreed by the parties pursuant to Article 19.

(b) In lieu of United States currency or United States Government Bonds provided for in the preceding paragraph a member may post and maintain with the conference one or more irrevocable letters of credit in the sum of Twenty-Five Thousand Dollars (\$25,000.00); provided that those letters of credit create an absolute obligation for the bank to pay against drafts drawn by the conference chairman or the Neutral Body accompanied by a debit note bearing a date not later than "thirty (30) days prior to said notice and, in the case of a Neutral Body assessment, a copy of the Neutral Body report; and further provided, that no other conditions for payment may be inserted in such letters of credit; that they are at all times maintained in the total sum of Twenty-Five Thousand Dollars (\$25,000.00); and that they are in all other respects satisfactory to the conference.

(c) The deposits and letters of credit provided for in paragraphs (a) and (b), and the proceeds thereof, if any, shall be applied to the payment of any dues, damages or Neutral Body assessments payable under Articles 10 and 25 or elsewhere in the agreement, unless fully paid or previously satisfied before they become delinquent in accordance with Article 28 hereof. In the event a letter of credit is posted in lieu of United States currency or United States Government Bonds, the Neutral Body will have the authority to draw drafts under the credit, accompanied by a copy of its report finding a breach and assessing damages and also a copy of the delinquent debit note, and to receive payment of the amount assessed from the bank on behalf of the conference.

(d) In the event of the termination of this agreement or termination of a membership or withdrawal of any of the members, the deposits made by the members concerned shall be returned to them, together with any accrued interest in the possession of the Conference, or in the case of letters of credit, they will be revoked, but only after any indebtedness to the conference has been fully satisfied and three (3) months have elapsed from the date of termination or withdrawal or until a decision is made in any Neutral Body cases pending against such member on the effective date of termination or withdrawal or in any case filed within said subsequent three-month period.

Article 25. NEUTRAL BODY

(a) Appointment and Qualifications of the Neutral Body:

(1) The Conference shall appoint, upon terms to be fixed by separate contract, an impartial independent person, firm or organization to be designated the Neutral Body which shall be authorized to receive written complaints reporting possible breaches of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice, and to investigate and decide upon such alleged breaches and, if such breaches are found, to assess damages, and in addition, to collect damages assessed, after payment thereof becomes delinquent.

(2) Appointment of the Neutral Body hereafter will be by vote of the Conference membership under Article 19 of the Conference Agreement. The appointment will be made from amongst candidates which are qualified and willing to serve.

Prior to such appointment a candidate will be required to divulge to the Conference any ~~material~~ "professional or business relationships or financial interests" ~~or service contracts~~ (hereafter in this Article simply "interests") which it may have with any of the members, their "employees, agents, subagents or their subsidiaries or affiliates" (hereafter in this Article simply "agents"). The candidate will also be required to agree, in the event of appointment, to divulge any future proposals it might receive to create such interests, and promise to obtain Conference approval thereof before accepting any such proposal. Such interests so divulged, if any, exclusive of financial interests, will not affect the qualification of the Neutral Body when appointed by the Conference with knowledge thereof, and the members will not raise an objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint against a member with which it may have such an interest. After disqualifying itself the Neutral Body is authorized to appoint an agent without such interest in the respondent to conduct the particular investigation and handle the complaint on behalf of the Neutral Body and such appointee shall have all of the authority and duties of the Neutral Body for that particular matter up through the date when the appointee reports its decision to the Ethics Committee under this Article 25(f)(4).

(3) The Neutral Body will have the authority and responsibility to engage agents, lawyers and/or experts, including shipping experts, who can assist with its investigation and consideration of complaints and to pay on behalf of the Conference all costs incidental thereto. Such agents or experts appointed by the Neutral Body must not have any interest in the particular member named in the particular complaint, although they will not be disqualified because they may have an interest, exclusive of a financial interest, with any other member or its agents.

(4) For purposes of this paragraph (a), the words "financial interests" do not include professional or business relationships whereby the Neutral Body or its agents or experts are engaged as independent contractors for professional or business services.

(b) Jurisdiction of the Neutral Body:

(1) The Neutral Body shall have jurisdiction to handle, in accordance with

the procedures of this Article all written complaints submitted to the Neutral Body by the Conference Chairman or a member alleging breach of the Conference Agreement, Tariff Rates, or Rules and Regulations, involving malpractice or, on its own motion, any breaches of the terms of this Article 25; ~~provided, that nothing herein contained shall change the functions of the Migrating Committee.~~

(2) "Malpractice" as used in this Article shall mean any direct or indirect favor, benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer, or other cargo interests or any of their agents, or any other act or practice resulting in unfair competitive advantage over other members.

(3) The Neutral Body shall have no authority to investigate any breach involving a malpractice which occurred more than two years before the filing of a written complaint pursuant to Article 25(b)(1), or more than two years before the discovery thereof under Article 25(f)(1).

(c) Member Lines' Responsibility to Report Breaches and Assist Investigations:

(1) The members and/or the Conference Chairman shall report promptly to the Neutral Body in a written complaint any and all information of whatsoever kind or nature coming to their knowledge which, in their opinion, indicates a breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or any breach of this Article 25 by a member or its agents, and failure to report such information by any member will be a breach of this Article.

(d) Investigation:

(1) The Neutral Body and/or its agents, shall have the power, authority and responsibility to investigate written complaints and in investigating said complaints to call upon a member or its agents at any of their offices during office hours and inspect, copy and/or obtain "correspondence, records, documents, signed written statements or oral information and/or other materials" (hereinafter in this Article "materials"), which materials are deemed by the Neutral Body in its sole discretion to be relevant to the complaint. Upon making such a call the Neutral Body shall have the right to see and copy such materials immediately and without prior screening by the member or its agents.

(2) Correspondingly each of the members shall have the duty and responsibility to supply such materials, and to cooperate in interviews promptly upon demand made in person by the Neutral Body or its agents and without prior screening, whether said materials or personnel are located in the member's own offices or in its agents' offices. Failure of a member or its agents to supply the materials required by the Neutral Body or its agents promptly will constitute a breach of this Agreement by the member, and the member undertakes to thoroughly inform its agents of the member's liability for their conduct and obtain their commitment to comply with the Conference Agreement, Tariff Rates or Rules and Regulations. In addition the members undertake an affirmative duty to cooperate and assist the Neutral Body in obtaining other required information whenever possible.

(3) The records of the Conference will be made available to the Neutral Body on request and the Conference Chairman and staff will render all assistance possible to the Neutral Body during investigations.

(e) Confidential Information:

(1) The Neutral Body will under no circumstances disclose the name of the complainant to the respondent or anyone else, including the Neutral Body's agents, unless specifically authorized to do so by the complainant.

(2) The Neutral Body will treat all information received during investigations regardless of the sources, as confidential and will not divulge any such information to anyone, except in reporting breaches found and damages assessed to the Ethics Committee, and then only to the extent that the Neutral Body itself deems appropriate.

(f) Hearing for the Respondent; Neutral Body Decisions and Announcement Thereof:

(1) On concluding its investigation, the Neutral Body will consider the information obtained and decide in its absolute discretion whether the facts have been sufficiently established to constitute a breach of the Agreement, Tariff Rates, or Rules and Regulations, involving a malpractice, and if a breach involving a malpractice is found which was not covered by the complaint, such breach may also be reported and damages may be assessed thereon against any member liable.

(2) In deciding whether a breach exists based on the results of its investigation, the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead it will employ rules of common sense in determining breaches and assessing damages and the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach occurred.

~~(3) After the Neutral Body has completed its investigation and arrived at its tentative decision that there was a breach (but before announcing the breach to the Ethics Committee, and even before the amount of damages is decided), the Neutral Body will inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose. Within fifteen (15) days, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or counsel, and offer to the Neutral Body such explanation as it may choose at such meeting.~~

(3) After the Neutral Body has completed its investigation, it shall advise the respondent either that a breach has not been found or that there are reasonable grounds to believe that a breach occurred. In the latter event, the respondent will be informed at this time of the nature of the alleged breach, and the evidence concerning it which the Neutral Body in its absolute discretion is able to disclose. In so advising the respondent, the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information. In all cases, however, the Neutral Body will inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fair play. Within fifteen (15) days, or within such reasonable time thereafter as the Neutral Body may in its sole discretion grant, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explanations

and/or rebutting evidence as it may deem proper and desirable. At such hearing, the Neutral Body shall consider all of the available evidence and make its decision in accordance with the standards set forth under Article 25(f)(2) hereof.

~~(4) The Neutral Body will then make its final decision and either discharge the respondent or assess liquidated damages against him.~~ On the basis of its decision, the respondent shall either be advised that a breach has not been found or, should a breach be determined to have been committed, assessed liquidated damages. In assessing said damages, the members recognize that breaches of the Conference Agreement, Tariff Rates or Rules and Regulations cause substantial damages, not only in lost freight but in consequent instability of the Conference rate structure. The members further recognize that the damages caused are cumulative with the number of breaches, but the members further recognize that it is difficult to assess such damages precisely. Therefore the Neutral Body is authorized to assess liquidated damages in accordance with the following schedule:

- a) First breach: maximum of Ten Thousand Dollars (\$10,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- b) Second breach: maximum of Fifteen Thousand Dollars (\$15,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- c) Third breach: maximum of Twenty Thousand Dollars (\$20,000) U.S.A. currency or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.
- d) Fourth breach and subsequent breaches: maximum of Thirty Thousand Dollars (\$30,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

Notwithstanding the difficulty in assessing such damages precisely, in determining the amount of liquidated damages to be assessed the Neutral Body shall consider such mitigating circumstances as it may deem relevant.

After its decision the Neutral Body will then report to the Ethics Committee the decision and the amount of the damage assessed, if any. In addition the Neutral Body may report evidence or information discovered during its investigation, but the extent of such further reporting, if any, shall be subject to absolute discretion of the Neutral Body, and in no event will the Neutral Body report the name of the complainant without consent, or report confidential information.

(5) The Ethics Committee will notify the members through the Chairman, of the decision and damages, if any, and will also at the same time instruct the Chairman to notify the respondent of the decision, ~~but only if a breach is found, and in such case and in case of a breach~~ the respondent will be furnished with the Neutral Body report and a Conference debit note covering the liquidated damages assessed.

(g) Unquestioned Recognition of Decisions of the Neutral Body:

(1) The members agree to accept the decisions of the Neutral Body as valid, conclusive and unimpeachable, but it is understood between the members that decisions of the Neutral Body are not admissions of proof or guilt or liability under law.

(2) The members further agree that neither jointly or severally will they bring any action whatsoever against the Neutral Body or its agents for damages allegedly arising out of its acts, omissions and/or decisions as the Neutral Body. In addition each member agrees to hold the other members of the Conference and the Neutral Body and its agents harmless from any claims which may be brought by its agents or employees against another member, the Conference or the Neutral Body or its agents for damages allegedly arising out of the Neutral Body's acts or functions.

(h) Payment of Damages:

(1) The members will pay all damages duly assessed by the Neutral Body upon receipt of a debit note from the Chairman, and if not paid within thirty (30) days of receipt of the debit note, the damages will become delinquent under Article 28 of the Conference Agreement.

(2) The Neutral Body will have the power and responsibility immediately, without notice to or further authority from the Conference, to collect as agent for the Conference and by any measures recommended by legal counsel, any damages duly assessed, as soon as they become delinquent, from the deposit or substitute security submitted and maintained by the members under Article 12 of this Agreement. The Neutral Body will pay over to the Conference immediately all damages collected.

APPENDIX C

NUMBERED EXCEPTIONS OF STATES MARINE LINES, INC.

1. Approves modification 150-29 to agreement 150-21 and modification 3103-26 to agreement 3103-17 when these modifications were not in evidence and the Commission denied a motion to reopen the record to consider them.

2. Approves agreements 150-21 as modified and 3103-17 as modified, when these agreements, with or without the modifications, violate the standards for industry self-regulation set forth by the Supreme Court in Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

3. Fails correctly to consider this case in light of Silver v. New York Stock Exchange, although the Commission requested the Court of Appeals to remand the proceeding to the Commission in order to reconsider it in the light of that case.

4. Concludes that agreements 150-21 and 3103-17 establish a fundamentally fair system of industry self-regulation within the meaning of Silver when none of the procedural safeguards specifically named in Silver are provided in such agreements.

5. Concludes, despite the lack of findings of fact on the agreements in issue, that conferences may establish a system of self-regulation which authorizes the assessment of fines upon a finding of breach of the conference obligations without giving an accused:

- (a) Notice of a complaint;
- (b) Opportunity to confront and cross-examine adverse witnesses;
- (c) The evidence upon which the determination of guilt or innocence will rest;
- (d) A hearing prior to a determination of guilt; and
- (e) Notice of the decision rendered, including specifications of which charges were found proved and which unproved.

6. Fails to find that a system described in paragraph 5 above (a) is illegal under Silver v. New York Stock Exchange and other applicable precedents; (b) operates to the detriment of the commerce of the United States; and (c) is contrary to the public interest.

7. Fails to recommend adoption of the States Marine proposals concerning notice, confrontation, investigation, hearing, and post-hearing procedure.

8. Fails to find that the conference agreements should include criteria for the assessment of fines, in order to prevent assessment by the neutral body of excessive, unreasonable fines which in the past have operated to the detriment of the commerce of the United States and have been contrary to the public interest.

9. Fails to make any finding of fact on the necessity of allowing an appeal from the neutral body's decision.

10. Fails to consider, and rejects the applicability of Silver v. New York Stock Exchange, insofar as Silver held that there should be a review of industry-imposed self-disciplinary procedures and penalties.

11. Fails to recommend approval of the States Marine proposal for appeal of the neutral body's decision to arbitration.

12. Concludes that an accounting firm may serve as neutral body, even though it is the regular auditor for a member line of the conference.

13. Concludes that such an accounting firm, serving as neutral body, may consider a complaint and render judgment on an accused when the neutral body serves as the regular auditor for the complainant-accuser.

14. Fails to make any findings of fact with respect to the evidence adduced at the hearing relating to the issue of whether amendments to conference agreements may be approved when adopted by a less-than-unanimous vote of the conference members.

15. Fails to find that amendatory agreements adopted over the dissent of any conference member operate to the detriment of the commerce of the United States and are contrary to the public interest.

16. Concludes that amendments to agreements are approvable under §15 of the Shipping Act (46 U.S.C. §814) when adopted by a less-than-unanimous vote of all parties to the agreement.

17. Approves the form of submission of amendments to conference agreements which is submitted in the name of all member lines of the conference, including members who opposed the adoption of the amendment.

18. Fails to find that the minutes of conference meetings should show, by name, which member lines voted against the adoption of an amendment.

NOTE: The respondents did not file exceptions, and the exceptions of Hearing Counsel are not susceptible of framing in summary statement form.

(S E R V E D)
(MARCH 25, 1966)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

NO. 1095

AGREEMENT NO. 150-21, TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN AND AGREEMENT NO. 3103-17, JAPAN-ATLANTIC
AND GULF FREIGHT CONFERENCE

ORDER

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof;

IT IS ORDERED, That Agreement No. 150-21, as modified by No. 150-29, and Agreement No. 3103-17, as modified by No. 3103-26, are hereby approved.

By the Commission.

/s/ Thomas Lisi
Secretary

(SEAL)

FILED NOV 10 1966

Nathan J. Paulson
CLERK

BRIEF OF PETITIONERS STATES MARINE LINES, INC., ET AL

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20134

STATES MARINE LINES, INC.,
GLOBAL BULK TRANSPORT CORPORATION,

Petitioners,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,

Respondents,

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN,
JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE,

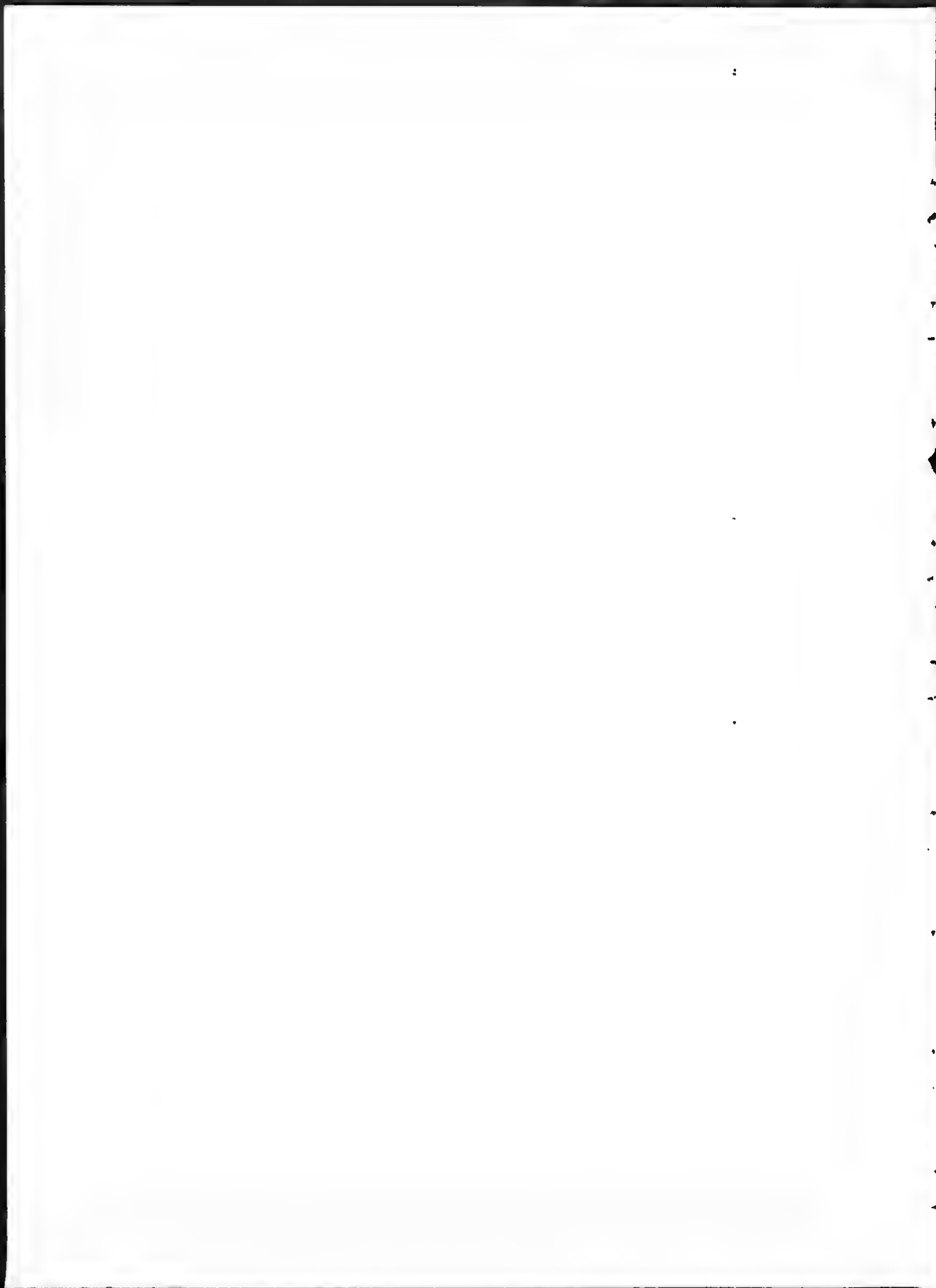
Intervenors.

Petition to Review an Order of the
Federal Maritime Commission

GEORGE F. GALLAND
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Lippman
1824 R Street, N.W.
Washington, D.C. 20009

*Attorneys for Petitioners
States Marine Lines, Inc. and
Global Bulk Transport Corporation*

July 15, 1966



(i)

QUESTIONS PRESENTED

1. Whether the Federal Maritime Commission may approve, under §15 of the Shipping Act, 1916, amendments to conference agreements which are adopted on less than unanimous vote and which bind all conference members, even though one or more conference members opposes the modifications and protests their approval?

2. Whether the Federal Maritime Commission properly approved, under §15 of the Shipping Act, 1916, Agreements 150-29 and 3103-26, which were (a) not noticed for hearing and (b) excluded from evidence?

3. Whether the Commission properly approved pursuant to Section 15 of the Shipping Act, 1916, and in light of *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), a so-called "neutral body" agreement which permits a private tribunal to assess liquidated damages for breaches of conference obligations, where the neutral body:

(a) is eligible to serve, although having a professional or business relationship with any conference member (including a complainant), except a conference member against which a complaint has been filed, if such relationship is disclosed before appointment or approved by the conference when it arises, even though after such appointment or approval no conference member may veto the appointment or otherwise prevent the continuation of the appointment of the neutral body;

(b) may receive complaints from undisclosed complainants, may reach its decisions on the basis of confidential information, and allows the respondent member line to provide a defense only after it has completed its investigation and arrived at a tentative decision of guilt;

(c) can impose assessments ranging from ten thousand dollars for a first offense up to thirty thousand dollars per offense for fourth or successive offenses, without limit as to the number of assessments which may be imposed;

(d) is not obligated to reveal the identity of a complainant in any case; and

(ii)

(e) makes decisions which are nonreviewable on the merits, although the decisions must conform to the standards of the agreement as approved by the Federal Maritime Commission?

4. Whether the Commission order under review is supported by substantial evidence and the requisite findings of fact and conclusions of law?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20134

STATES MARINE LINES, INC.,
GLOBAL BULK TRANSPORT CORPORATION,

Petitioners,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,

Respondents,

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN,
JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE,

Intervenors.

Petition to Review an Order of the
Federal Maritime Commission

PETITIONERS' BRIEF

JURISDICTIONAL STATEMENT

Petitioners seek review of a final order of the Federal Maritime Commission which approved two agreements, as modified by two other agreements, under §15 of the Shipping Act, 1916, 46 U.S.C. §814. This Court has jurisdiction to review the order under the Judicial Review Act of 1950, 5 U.S.C. §§1031-42.

STATEMENT OF THE CASE

1. Introduction: History of the Litigation.

Petitioners operate a joint service as a common carrier by water under the name States Marine Lines. In the trade from Japan to U.S. Pacific ports, States Marine is a member of the Trans-Pacific Freight Conference of Japan (TPFCJ). TPFCJ is a private rate-making association of steamship operators in the trade from Japan to the Pacific Coast of North America under Agreement No. 150, which was approved by the Commission¹ under §15 of the Shipping Act, 1916, 46 U.S.C. §814. States Marine also operates from Japan to U.S. Atlantic and Gulf ports, and in that trade is a member of the Japan-Atlantic and Gulf Freight Conference (hereafter "JAGFC"). JAGFC is a private rate-making association similar to TPFCJ but covering the trade from Japan to the U.S. Atlantic and Gulf Coasts under Agreement No. 3103, which was similarly approved by the Commission under §15 of the Shipping Act, 1916. Commission approval exempts the agreements from the antitrust laws.

Both conference agreements (which are virtually identical) (Exs. 21, 22, JA 243-71) established machinery whereby the member lines agree on rates, charges, rules and practices. The agreements, as originally approved, provided that a member shall be subject to fine for breach of its conference obligations. The fact of the breach, and the amount of the fine, were to be decided and agreed upon by *all* the conference members, except the accused party. There was then an appeal to an impartial board of arbitration.

In January, 1959, the conferences filed amendments to their approved agreement, establishing for the first time a "neutral body" system of self-policing. The "neutral body" was to be an outside person or firm whose duty it was to uncover breaches of conference agreements and fine their perpetrators. These amendments were approved by the

¹ "Commission" refers to the Commission and its many predecessor agencies.

Commission in March, 1959 and established what will be referred to hereafter as Neutral Body System #1 (Ex. 21, pp. 9-11; JA 263-65).²

In January 1962 both conferences again filed modifications of their agreements, changing the 1959 neutral body machinery. These amendments (150-21 and 3103-17, Exs. 1, 2; JA 208-20) established what will be referred to hereafter as Neutral Body System #2.³ The Commission announced the filing of these amendments in the Federal Register (27 F.R. 9901) and invited comment from interested parties. States Marine, which had voted against both amendments in the conferences, protested, demanding that the modifications be disapproved, and requested a hearing. The grounds of States Marine's opposition to the new neutral body system will be set forth in detail below, pp. 31-62. In summary, however, States Marine contended (1) that the agreements could not be approved under §15 of the Shipping Act because States Marine, which was purportedly bound by them, had refused to sign them; (2) the amendments established a neutral body with an inherent bias, since it could be employed by any member of the conference, including a member who filed a complaint with it, but could not be employed by a member under investigation; and (3) the procedures established for neutral body operation were grossly unfair, in that there was no notice of charges, no right to know the evidence against one, to confront or cross-examine witnesses, and hence no right to a meaningful hearing, and no right of appeal from the neutral body's decisions.

On October 30, 1963 the Commission, after receiving affidavits, memoranda, and hearing oral argument (JA 4-5), served its report and order approving the agreements, one Commissioner dissenting (JA 5-32). The Commission's report rejected States Marine's criticisms of the lack of neutrality and lack of procedural safeguards in the neutral body system, by stating

² The provisions of Neutral Body System #1 are set forth infra, p. 7.

³ The provisions of Neutral Body System #2 are set forth infra, pp. 7-9.

that the Commission was "not inclined, when considering approval, to specify procedures by which the parties seek to insure that each will fulfill its obligations to the others." Further, the Commission held that it may approve an amendment to a conference agreement, as binding on all conference members, which was not adopted by one or more member lines.

States Marine appealed the Commission decision to this Court. *States Marine Lines, Inc. v. Federal Maritime Commission*, C.A. No. 18227. The Commission did not reply to States Marine's brief in the Court of Appeals. Instead, it requested the Court to remand the case to it for further consideration. The General Counsel's request for remand stated:

"In support of their position before this Court, petitioners place heavy reliance on the recent Supreme Court decision in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), involving Exchange self-regulation. *Silver* was decided after the Commission had heard oral argument in its Docket No. 1095 and was never cited to nor considered by the Commission. Accordingly, the Commission desires to reopen and reconsider this case in light of *Silver* and to conduct such further proceedings as it deems appropriate. Orderly procedure would also seem to dictate such a course. Upon the Court's remand, the Commission will vacate the existing report and order and will afford the parties to Docket No. 1095 full opportunity to offer evidence and argument in the reopened proceeding."

The Court remanded the case to the Commission.

By order served April 3, 1964, the Commission vacated its previous report and order and set the new neutral body amendments for rehearing. States Marine moved to expand the issues on rehearing to encompass the legality of the approved *original* neutral body procedure (Neutral Body System #1 Exs. 21, 22; JA 243-71) on the ground that even such procedure did not meet the standards set forth in *Silver*. The States Marine motion was granted by the Commission's order of May 15, 1964, which provided for "a general inquiry into all pertinent aspects of the Neutral Body systems of the respondent conferences,

encompassing both the neutral body systems as they now stand approved by the Commission and as proposed to be modified. . . ." (JA36).

At the first prehearing conference in Docket 1095 of June 16, 1964, conference counsel expressed hope for an out-of-commission settlement. He stated that "we have reached a time when we might consider before proceeding with another long drawn out affair in the way of a hearing, explorations regarding possible negotiations regarding a possible compromise" (Preh. Tr. 4; JA37). Conference counsel invited States Marine and Hearing Counsel to submit in writing suggestions for a neutral body system, in particular, to "delineate — in view of all circumstances in light of the present state of the law since *Silver* — either point references or either specific language by way of modification to these amendments." Following such submissions, conference counsel promised "as attorneys for both conferences [to] undertake diligently to inspect the modifications, present it to our clients and obtain a definitive conclusion as to whether or not we are able to accept them. . . ." (Preh. Tr. pp. 8-9; JA 38). On July 31, the date agreed, States Marine submitted its draft of proposed Neutral Body amendments (Ex. 5; JA 221).

The conferences' response to both States Marine's and Hearing Counsel's suggestions was totally negative (Ex. 7; JA 229). Each conference stated that it "desires to maintain the substance of the agreements approved by the Commission on October 30, 1963 and now pending before the Commission for reconsideration" (Ex. 7, p. 10; JA 230).⁴

⁴ The only reference to the detailed proposal submitted by States Marine occurred on the last page of the conference response, wherein the conference stated that "some parts of the proposals offered by States Marine Lines on July 31 are to the same effect as the provisions already adopted by the conference, while other parts are unworkable for practical reasons, if the system is to serve the statutory requirement of adequately effective policing" (Ex. 7, p. 8; JA 234). The only reference in the conference submission to the Silver case — which was the guideline proposed by conference counsel when requesting States Marine's and Hearing Counsel's suggestions — is in a footnote on page 6 of the conferences' response. In that footnote, the conferences stated that the Silver case "is not relevant to this situation" (Ex. 7, p. 6; JA 233).

Because of the failure of the parties to reach any agreement, the new prehearing conference held on September 15, 1964 set the case for hearing on October 19, 1964 (Preh. Tr. 58-59; JA 39). Hearings consuming some 1700 pages of transcript, were held from October 19, 1964 to November 6, 1964.

During these hearings, States Marine offered evidence on whether the neutral body amendments were invalid because not adopted unanimously, but the Examiner ruled that that issue had not been set for hearing by the Commission's orders. States Marine appealed that ruling, and on November 19, 1964 the Commission issued an order expanding the issues to include the unanimity issue (JA 161). Further hearings were then held on this issue on December 15, 1964, February 16, 1965, and March 3, 1965.

At the February 16 hearing, the conferences sought to introduce further amendments to the pending neutral body amendments. These amendments, Nos. 150-29 and 3103-26, referred to hereafter as Neutral Body System #3, were adopted by the conferences over States Marine's protest (Tr. 1553; JA 178), but were filed with the Federal Maritime Commission. At the time these amendments were offered into evidence (Exhibits 82 and 83, Tr. 1553), they were rejected by the Examiner as not within the scope of the hearing. At the hearing held on March 3, 1965, the same exhibits were again offered and this time received solely for the purpose of showing "States Marine's motivation" (Tr. 1694; JA 203). The conferences then filed a motion to expand the issues in Docket 1095 to include the new amendments. This motion was opposed by States Marine, and the Commission denied it by order served March 31, 1965 (JA 328). The record was closed by the Examiner on March 3, 1965 (Tr. 1705; JA 207).

The Examiner's Initial Decision rejected each and every objection to the neutral body system lodged by States Marine, and recommended that the Commission approve Neutral Body System #2 as modified by Neutral Body System #3 (JA 336). States Marine filed exceptions to the Examiner's decision; oral argument was held, and the Commission

issued its report and order under date of March 25, 1966. This report followed the initial decision, and, rejecting each States Marine objection, the Commission approved Agreements 150-21 and 3103-17 (Neutral Body System #2) as modified by Agreements 150-29 and 3103-26 (Neutral Body System #3) (JA 393). This appeal followed.

2. The Neutral Body Systems.

(a) Neutral Body System #1.

The first neutral body system was adopted by the TPFCJ in March, 1958; was not submitted for approval until early 1959, and was approved on March 12, 1959. It is set forth in Appendix A to the Commission's report, as Article 25 to the Conference Agreement (JA 439). The amendment provided that the neutral body shall be

"selected and appointed by the conference from responsible accountants or other person or persons, not a party to, nor employed by or financially interested in any party to the agreement . . . (JA 440; emphasis supplied).

The neutral body was empowered to receive complaints, investigate them, engage agents to help with investigations, decide in its "absolute discretion" whether an infringement had taken place, and to assess fines varying from a maximum of \$10,000 for a first offense to \$30,000 for a fourth or subsequent offense (JA 441). No further procedures for investigation or decision-making were required.

(b) Neutral Body System #2.

In January, 1962 the conferences filed Agreements 150-21 and 3103-17 with the Commission for approval under §15. The system established by these agreements (Exs. 1, 2; JA 208-20) substantially changed the qualifications of the neutral body. Article 25, paragraph (c) of neutral body system #2 provides that the "Conference shall appoint . . . an impartial, independent person, firm or organization to be designated the Neutral Body . . ." (Ex. 1, p. 3; JA 211). Prior to appointment, the neutral body is required to disclose any affiliation with a member line, but

after disclosure and appointment, no member line can object to the neutral body's affiliations. If the neutral body receives a complaint against the member line with whom it is affiliated, it must disqualify itself, and appoint an unaffiliated agent. If, however, the *complainant* is the affiliated line, the neutral body may still investigate and punish.

Neutral Body System #2 also set forth certain procedures which the Neutral Body must follow. First (Art. 25, Paragraph (c)), the members were required to report any suspected breaches of conference obligations; failure to report was a breach (Ex. 1, p. 4; JA 213). Second (Art. 25, Paragraph (d)), the neutral body was empowered to investigate alleged breaches by inspecting or obtaining any letters, records or books of any member line; failure to supply these materials was a breach (Ex. 1, p. 4; JA 213-14). The neutral body was specifically *not* permitted (Art. 25, paragraph (e)) to disclose either the name of the complainant, or any information received, to anyone (Ex. 1, p. 5; JA 214).⁵ The agreement then states (Art. 25, paragraph (f)(1)) that "On concluding its investigation, the Neutral Body will consider the information obtained and decide in its absolute discretion whether the facts have been sufficiently established to constitute a breach of the Agreement, . . ." The neutral body is cautioned (Art. 25, (f)(2)) that in reaching its decision, it "will not be restricted by legal rules of evidence or the burden of proof Instead . . . the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach probably occurred" (Ex. 1, p. 5; JA 215). Next step (Art. 25, (f)(3)), "after the Neutral Body has completed its investigation and arrived at its tentative decision that

⁵ (e) Confidential Information:

(1) The Neutral Body will under no circumstances disclose the name of the complainant to the respondent or anyone else, including the Neutral Body's agents, unless specifically authorized to do so by the complainant.

(2) The Neutral Body will treat all information received during investigations regardless of the sources, as confidential and will not divulge any such information to anyone, except in reporting breaches found and damages assessed to the Ethics Committee, and then only to the extent that the Neutral Body itself deems appropriate.

there was a breach" is to "inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose." After such "notice", the respondent may, within 15 days "meet with the Neutral Body, with or without its own accountant and/or counsel, and offer to the Neutral Body such explanations as it may choose at such meeting" (Ex. 1, p. 5; JA 215). The neutral body then makes its decision (Art. 25 (f)(4)), discharging the respondent or assessing fines, again varying from maxima of \$10,000 to \$40,000. The neutral body then reports its decision to the Conference's Ethics Committee, which in turn (Art. 25 (f)(5)) tells the respondent "only if a breach is found" (Ex. 1, pp. 5-6; JA 217). There is no appeal (Art. 25 (g)) from the neutral body's decision (Ex. 1, pp. 6-7; JA 217).

(c) Neutral Body System #3.

Neutral Body System #3 (Agreements 150-29 and 3103-26) was adopted by the Conferences on January 8, 1965 and submitted for approval the same day (Exs. 82, 33; JA 279-93). No notice of the agreement was ever published in the Federal Register. As set forth above, p. 6, they were excluded from evidence except for the limited purpose of showing "States Marine's motivation" (Tr. 1694; JA 203) in opposing them. The differences between Neutral Body Systems #2 and #3 may be seen by reference to Appendix B to the Commission's report (JA 442), where language formerly appearing in Neutral Body System #2 is crossed out, and language added by system #3 is underlined.

With respect to neutrality, the neutral body is no longer required to disclose service contracts. Financial interests, even if disclosed, are now made disqualifying, but professional or business relationships still are not (JA 444).

With respect to procedure, the member lines' responsibility to report (Art. 25(c)); investigation (Art. 25(d)); and non-disclosure of complainant and evidence (Art. 25(e)) provisions are unchanged (JA 445-46).

The neutral body is still not restricted to legal rules of evidence, or burden of proof, but now must persuade itself (still by common sense) that the breach "occurred" (Art. 25(f)(2)) (JA 446).⁶ After the neutral body completes its investigation, it now (Art. 25(f)(3)) advises the respondent whether there "are reasonable grounds to believe that a breach occurred." If so, it discloses the nature of the alleged breach, and such evidence which "in its absolute discretion [it] is able to disclose." It is told to reveal the actual evidence "unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information." The Neutral Body is told to keep "in mind basic precepts of fair play." The accused then gets a hearing and the neutral body makes its decision (JA 446-47).

Neutral Body System #3 also (1) provides for notification to the accused if he is found innocent (Art. 25(f)(4) and (5)) (JA 447); (2) adds a provision requiring the neutral body, in assessing damages, to "consider such mitigating circumstances as it may deem relevant" (Art. 25(f)(4)) (JA 447); and (3) sets a two-year limitation period for offenses which may be investigated (Art. 25(b)(3)) (JA 445).

3. The Issues.

This case presents two issues which have never been adjudicated by any court. The first such issue is whether, under Section 15 of the Shipping Act, the Commission may exempt steamship lines from the application of the antitrust laws with respect to an agreement when such lines do not wish to be parties to that agreement. The second novel issue presented is whether, under Section 15 of the Shipping Act, the steamship industry's program of self-policing is to be governed by traditional rules of fair procedure, or whether the industry's self-policing program may dispense with such rules.

⁶ The word "probably" is deleted; the Appendix to the Commission's report does not show this change.

In *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 472 (1940), the Supreme Court held that standing to review was proper based merely on a *threat* of economic injury. Since there is no question that States Marine is "likely to be financially injured"¹⁴ — the test in *Sanders* — it is clear that States Marine is "aggrieved" and thus "adversely affected".¹⁵

The Supreme Court decision in *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) is also in conflict with intervenors' argument that States Marine's petition for review is speculative. There the Court found "enough" to aggrieve the party if contractual rights and business relations are adversely affected:

"Again in *Columbia Broadcasting System v. United States*, . . . this Court considered the problem of standing to review Commission action . . . CBS there sought review of the adoption of Chain Broadcasting Regulations by the Commission. Against the contention that the adoption of regulations did not commend CBS to do or refrain from doing anything, dissent 316 U.S. 429, 62 S. Ct. 1206, this Court held that the order promulgating regulations was reviewable because it presently affected existing contractual relationships. (351 U.S. at 198-99).

Precedents under the Shipping Act on the subject of "standing" are scarce, because once the order is reviewable, there is usually little dispute about whether the petitioner is "aggrieved". One Shipping Act case which did discuss standing was *Government of Guam v. F.M.C.*, 329 F.2d 251 (C.A.D.C., 1964). In that case, this Court affirmed the standing of the government of Guam to challenge a Maritime Commission order setting rates between the U.S. and Guam. Guam's "standing" rested on the alleged economic harm which the people of Guam would suffer from the order.

¹⁴ 309 U.S. at 477. Indeed, the past fines have made the "likelihood" a reality.

¹⁵ The *Sanders* doctrine has been consistently followed. E.g., *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4 (1942); *F.C.C. v. N.B.C. (KOA)*, 319 U.S. 239 (1943).

The enactment of Public Law 87-346 was a response to the investigations which had been conducted from 1959 to 1962 by the House Anti-trust Subcommittee (Celler Committee). That committee investigated in depth the workings of the conference system and the role of the Commission as supervisor of conferences. The Subcommittee published a report⁹ which, after reviewing the scheme envisaged for steamship regulation by the Shipping Act, industry practices under the Act, and the administration of the Act by the Commission, concluded that the Commission had utterly failed to inhibit conference abuses.¹⁰ The report spelled out, by chapter and verse, violations of conference agreements in every trade,¹¹ and considered whether a "neutral body" system proposed by some witnesses could aid in curbing such abuses.¹²

Public Law 87-346, as enacted, authorized industry self-policing, but did not require it, as did an earlier House version of the bill. Thus conferences were not commanded to police themselves, but were threatened with dissolution if their mutual obligations were inadequately policed. Under the Congressional scheme, the initiative was the conferences'; if that initiative were not taken, the Commission could order extinction.¹³

⁹ Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 2d Sess., Report on the Ocean Freight Industry (Comm. Print 1962) (the Celler Report)

¹⁰ Celler Report, pp. 362-363.

¹¹ Celler Report, pp. 223-303.

¹² Celler Report, pp. 318-19.

¹³ Even this degree of self-regulation was criticized by the Department of Justice. Justice White, then deputy Attorney General, stated, in a letter to Senator Magnuson, Chairman of the Senate Commerce Committee, the Department of Justice's position on P.L. 87-346:

"We question the policy requiring conferences to engage in private 'policing'. Congress should neither require nor permit cartels, even the ones in ocean shipping, to use penalties to coerce compliance with their cartel agreements. Nor do we believe Congress should delegate to cartels the responsibility for enforcing our maritime laws, especially in view of the potential harm that could be caused by unwarranted coerced disclosure of confidential business records to competitors and from the assessment by the cartels of harsh or discriminatory penalties."

1961 U.S. Code Cong. and Adm. News, p. 3141. The Department's anxiety was soon shown to rest on firm ground. See *infra*, pp. 31-32.

The Commission's first decision in this case (JA 14) interpreted the Congressional directive as a carte blanche authorization to the conferences to formulate whatever self-policing system they chose. The Commission said in that decision that Congress "left to the individual conferences the method best suited for their particular trade and situation We are not inclined . . . to specify the procedures by which the parties seek to insure that each will fulfill its obligations . . ." (JA 20). States Marine's brief to this Court on appeal from that decision contended that the Commission had a duty to insure that all neutral body systems approved by it included the procedural safeguards established for industry self-policing by *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

The Commission's second report, here under review, abandons its previous laissez-faire position, but reaches the same result by a different route. The second report purports to distinguish *Silver* (JA 402), and then purports to apply it. The application consists primarily in a distinction between "criminal due process" and "fundamental fairness." Thus the heart of the Commission's decision is:

"The real thrust of States Marine's argument regarding *Silver* is that the Neutral Body system is required to assure a conference member accused of a breach of the conference agreement virtually all the safeguards the criminal law affords a person charged with a crime. *Silver* clearly will not support such a proposition, and to adopt anything like it here would in our view render any self-policing system totally ineffectual and thus defeat an express statutory purpose of Congress.

* * *

Thus, the Court makes it clear that the kind of notice, hearing and opportunity to answer charges which should be afforded is that found in 'public agencies, labor unions, clubs and other associations.' The procedural safeguards accorded in these institutions are not the same as those accorded a criminally accused. The association-type enterprise traditionally follows less rigid standards which, as long as they comport to the necessarily indefinite standard of fundamental fairness can be almost anything to which the members agree to be bound" (JA 403).

Having made this distinction, the Commission discusses and then approves each of the self-policing provisions as "fundamentally fair" (JA 404-12). It finds *Silver* no bar to approval, and, apparently assuming its distinction between "criminal due process" and "fundamental fairness" obviates the need to consider any precedent on the issues presented — none are cited or discussed¹⁴ — concludes that the neutral body systems here proposed are proper industry self-policing mechanisms. States Marine contends that the Commission's distinction is meaningless; that each of the safeguards it requests have been held due process protections precisely because denial of them was "fundamentally unfair"; that in any event the specific safeguards it seeks are required by *Silver*, and by other applicable precedents; and that the answer to the question of whether the steamship industry can regulate itself without according an accused member line adequate procedural safeguards, or a judge untainted by business and professional affiliation with his accuser, should be: No.

c. Commission Procedure.

A third issue presented by this case, and one that is not novel, is whether the administrative tribunal may, as the Commission did here, approve an agreement submitted for approval when that agreement was excluded from evidence in the very case in which approval was granted. The answer to this issue — in States Marine's view — should also be: No.

STATUTE INVOLVED

Section 15 of the Shipping Act, 1916, is the statute here involved, and it is set out in full in Appendix A.

¹⁴ There is one exception to this statement: The Commission did consider cases concerned with the right to appeal. See *infra*, pp. 59-62.

STATEMENT OF POINTS

1. An agreement cannot be approved under §15 of the Shipping Act, 1916, which binds to its terms a steamship line which has not adopted it. The Commission's contrary conclusion is unsupported by law, or by substantial evidence on this record.

2. Agreements 150-29 and 3103-26 (Neutral Body System #3) were improperly approved by the Commission because (a) they were not set for hearing; (b) they were excluded from evidence by the Examiner and on appeal by the Commission itself, except for the limited purpose of showing States Marine's "motivation" in opposing them; and (c) States Marine had no opportunity to rebut them, or cross-examine witnesses as to their application, meaning and scope.

3. A steamship industry self-policing system is detrimental to the commerce of the United States and contrary to the public interest, and hence cannot be approved under §15 of the Shipping Act, which employs a tribunal to levy fines which tribunal (a) may be affiliated with a complaining member line, but not with an accused member line; and (b) does not give an accused specific notice of the charges; knowledge of the evidence against him; an opportunity to rebut such evidence and to confront and cross-examine his accusers; or an appeal from the tribunal's judgment. The Commission's contrary conclusion is unsupported by law, or by substantial evidence in the record.

SUMMARY OF ARGUMENT

- I. AN AGREEMENT CANNOT BE APPROVED UNDER §15 OF THE SHIPPING ACT, 1916, WHICH BINDS TO ITS TERMS A STEAMSHIP LINE WHICH HAS NOT ADOPTED IT.

Section 15 of the Shipping Act provides that persons subject to the Act shall file with the Commission for approval: "... every agreement . . . or modification or cancellation thereof, to which it may be a party or conform in whole or in part . . ." Upon approval by the Commission, the parties are exempted from the operation of the anti-trust

laws. Under the language of Section 15, an agreement is approvable only when it is agreed to by the parties on whose behalf it is purportedly submitted. Thus an amendment to a conference agreement, which is itself an agreement and needs §15 approval, cannot be approved when submitted for approval over the objection of dissenting conference members.

A majority amendment rule, which is in force in these conferences, turns §15 on its head by permitting some lines to force others to engage in restraints of trade. Since a line must by economic necessity (the dual rate system) belong to a conference, a majority amendment rule not only deprives a line of any effective control over its own affairs, but allows a majority of the lines to oppress and destroy their competitors. Further, a majority amendment rule is void for indefiniteness under the law of contracts.

A majority amendment rule has been shown unnecessary for conference functioning on this record. So far as the available evidence shows, all amendments to the existing conference agreements here in issue — until the neutral body disputes — have been adopted without dispute. Eighty-three percent of all conferences functioning in United States commerce have unanimous amendment provisions. The member lines of these inbound conferences function together in outbound conferences by unanimous amendment.

II. THE COMMISSION COULD NOT APPROVE, UNDER SECTION 15 OF THE SHIPPING ACT, 1916, AMENDMENTS WHICH WERE (A) NOT NOTICED FOR HEARING, AND (B) EXCLUDED FROM THE HEARING

Neutral body system #3 (Agreements 150-29 and 3103-26) was excluded from evidence by the Examiner except for the limited purpose of showing States Marine's "motivation" — and this ruling was sustained by the Commission. The Commission decision approving them anyway is invalid because it is based on evidence outside the record. *U.S. v. Abilene and S. Railway Co.*, 265 U.S. 274 (1924). The defect is not cured by allowing parties to present proposals in briefs; decisions must be supported

by evidence in the record — not on briefs. *Norris and Hirshberger v. S.E.C.*, 163 F.2d 689 (C.A.D.C., 1947), cert. denied 333 U.S. 867. The Commission's power to modify agreements under §15 is limited to situations where the Commission makes one of the statutory findings set forth in §15 for disapproval, cancellation, or modification. *Aktiebolaget-Svenska Amerika Lines v. Federal Maritime Commission*, 351 F.2d 756 (C.A.D.C., 1965). The Commission made no such findings, and it therefore had no power to modify the amendments which were part of the evidentiary record.

III. THE STEAMSHIP INDUSTRY'S SELF-POLICING SYSTEM
 MUST (A) PROVIDE AN UNBIASED TRIBUNAL, AND
 (B) INCLUDE ADEQUATE PROCEDURAL SAFEGUARDS

A. Neutrality.

The present controversy has its roots in litigation commencing in 1959, which culminated in a 9th Circuit Court of Appeals decision in 1963: *Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission*, 314 F.2d 928. That decision set aside two fines assessed against States Marine by the TPFCJ's first neutral body, and invalidated a third. These fines, totalling \$35,000 were imposed for three successive refusals of access to records: they were set aside by the court because, as States Marine had charged, the neutral body was secretly employed by a conference member, contrary to the explicit terms of the neutral body agreement. Such oppressive, run-away neutral body behavior is detrimental to commerce and contrary to the public interest; it must be cured not by sanctioning neutral body affiliations with conference members, but by proscribing them.

The neutral body is investigator-prosecutor-judge-jury; this combination of functions, dangerous in itself, must be balanced by requirements of strict neutrality. The neutral body makes judgments on the basis of evidence, and must be free to punish or acquit uninfluenced by such considerations as are inherent when the accuser is its client or employer. Accountants, who usually perform neutral body work, are no

different from other men or women, and the standard for determining their eligibility must be objective, not subjective. In cases where fairness demands strict neutrality, affiliation has always been obnoxious to the courts. *Tumey v. State of Ohio*, 273 U.S. 510 (1927); *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961); *Holt v. Virginia*, 381 U.S. 131 (1965); *United States v. Manton*, 107 F.2d 834 (C.C.A. 2d, 1938), cert. denied 309 U.S. 664; cf. *Ruiz v. Delgado*, 359 F.2d 718 (C.A. 1, 1966).

B. Notice, Confrontation, Investigation, Hearing

The Commission purported to distinguish *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the case which this case was remanded to consider. The distinctions are untenable, and the Commission should have applied *Silver*, not ignored it. The rights which *Silver* held essential for stock-exchange self-policing are essential for steamship self-policing, and they are not respected in any of the conference versions of the neutral body systems.

The conference provisions for notice — disclosure of the "nature of the alleged breach as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose" — does not give adequate notice and does not enable the accused to prepare a defense. The record showed that lack of notice has prejudiced accused lines in the past; indeed conference testimony showed that the conference systems do not give notice because the conferences are not concerned with prejudice to the accused. The giving of notice will not alter the supply of available evidence.

The conference systems, which prohibit confrontation, cross-examination, or any disclosure of information to the accused which (in the absolute discretion of the neutral body) will reveal the accuser, are unlawful under *Silver*. The accused must know all information which forms the basis for a verdict if the proceeding is to be fundamentally fair: *Greene v. McElroy*, 360 U.S. 474 (1959); *In Re Oliver*, 333 U.S. 257 (1948);

Pointer v. Texas, 380 U.S. 400 (1965). Without such disclosure, the hearing is a sham — the conference admitted as much. The Commission erred by not requiring the neutral body systems to provide adequate procedural safeguards.

C. Criteria For Fines.

The neutral body systems should contain specific criteria for the neutral body to consider in assessing fines. The record showed that neutral bodies in the past have assessed maximum fines in circumstances where the amount of such fines was totally out of proportion to the offense committed — or not committed. Excessive fines are detrimental to commerce and contrary to the public interest.

D. The Right To Appeal.

An appeal to arbitration is necessary in order to provide some check on the neutral body, both because of past, run-away neutral body behavior, and because some form of review is essential for industry self-policing. *Silver v. New York Stock Exchange*, 373 U.S. 359-60. Since §15 approval immunizes conference self-policing from review by means of anti-trust liability, an appeal to arbitration is the only method of review, and the Commission's failure to require the self-policing system to provide review by way of arbitration was error.

ARGUMENT

I. AN AGREEMENT CANNOT BE APPROVED UNDER §15 OF THE SHIPPING ACT, 1916, WHICH BINDS TO ITS TERMS A STEAMSHIP LINE WHICH HAS NOT ADOPTED IT

A. The Law.

The Commission held, quoting its first report in this case, that it may approve under §15 of the Shipping Act agreements which are not adopted by parties whom they purport to bind. This construction of §15 offends the language and the spirit of the section.

The Shipping Act of 1916 in §15 (46 U.S.C. §814) clearly sets forth those agreements which are approvable by the Commission:

"... every agreement . . . or modification or cancellation thereof, to which...[the carrier] may be a party or conform in whole or in part . . ."

Each amendment to an agreement is itself an agreement. States Marine is not a party to any of the amendments in issue. It voted against the adoption of all and signed none; it conforms to none, in whole nor in part. Under the very language of the section, the amendments are unapprovable.

A less-than-unanimous agreement offends not only the language of the statute, but the entire statutory purpose. Section 15 provides a dispensation to common carriers to engage in activity otherwise unlawful under the antitrust laws provided certain conditions are met: the activity is made lawful because the agreement to engage in it is approved by the Commission. Presumably, only the Commission can confer anti-trust immunity on any carrier. Yet a less-than-unanimous amendment rule enables a stated percentage of some common carriers, with the Commission's permission, to force other carriers to engage in anti-competitive activity in which those other carriers do not wish to engage. The statute is turned on its head: Section 15, instead of a dispensation allowing carriers to collaborate, becomes a weapon whereby some carriers may force others to collaborate against their will, and the Commission is placed in the absurd position of conferring anti-trust immunity upon a line to engage in anti-competitive practices in which the line does not wish to participate.

States Marine argued to the Commission that the majority amendment rule is analogous to a contract wherein two contracting parties are given the unfettered right to change the rights and obligations of a third contracting party. It is clear, under familiar principles of contract law, that such a contract is void for indefiniteness. Williston, *Contracts*,

§37 (3d ed. 1957).¹⁵ The Commission rejected this analogy, saying the conference agreement is rather comparable to a corporation whose charter can be changed by non-unanimous vote, the dissenting stockholders being forced to acquiesce or sell their stock (JA 414). "The latter alternative is", said the Commission, "in effect, resignation from the corporation" (JA 414). The Commission said that States Marine, by accepting membership in the conferences, became bound to its terms, and must conform to such terms no matter how often or how radically amended, "so long as it chooses to remain a member" (JA 415).

This lecture — abide by the rules or drop out of the game — is scarcely worthy of an agency whose duty it is to protect the commerce of the United States and the public interest, since neither is served when competition is suppressed. And, as the Commission knows, a line which is forced to drop out of a conference may be forced to drop out of the trade. Because of this fact, the Commission's predecessors have always insisted that membership in a conference be open to all applicants in the trade on equal terms.¹⁶ The necessity for such a policy stems from a conference's ability to tie up the major portion of cargo in a trade by use of the "dual rate system" — a system whereby shippers contract to ship all their cargo on conference lines in return for a lower — "contract" — rate.¹⁷ Thus, unless the Board enforced an open door policy with respect to conference membership, a conference could achieve the summit of monopoly power: by refusing membership to any line, it could drive

¹⁵ Accord: *E.g.*, *Joseph v. Donover Co.*, 261 F.2d 812, 820 (C.A. 9, 1958); *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923); *Terre Haute Brewing Co. v. Dugan*, 102 F.2d 425 (C.A. 8, 1939).

¹⁶ *E.g.*, *Black Diamond S.S. Corp. v. Compagnie Maritime Belge*, 2 U.S.M.C. 755 (1946); *American-Hawaiian S.S. Co. v. Intercontinental Marine Lines*, 4 F.M.B. 160 (1953). See Celler Report, pp. 97-98.

¹⁷ The operation of a dual-rate system is described in detail in *Federal Maritime Board v. Isbrandtsen Company*, 356 U.S. 481 (1958) which outlawed its use. Congress then amended the Act to legalize the dual rate system, with certain additional safeguards. Public Law 87-346, 75 Stat. 762.

that line out of the trade. A conference, then, is something more than a social or corporate club: it controls, in trades with a dual rate system, the fate of carriers who engage in ocean commerce. Both conferences involved here have obtained permission from the Commission to use the dual rate system.¹⁸

Given this economic necessity of conference membership, the consequences of allowing a majority of the conference lines to change beyond recognition the commitment of a minority are grave. For example, in *United States v. Trans-Pacific Freight Conference*, N.D. Calif., So. Div., Civil No. 41349, (1963), the Justice Department sued every member of the conference, including *States Marine*, for the conference's illegal activities which had been opposed by *States Marine* every inch of the way.¹⁹

Again, a conference could vote to deprive one or more members of its vote, and under the majority-amendment rule, that member could not block such a proposal. This supposition is not fanciful: the TPFCJ filed such an amendment for approval.²⁰

Thus, unless conference agreements can be changed only unanimously, a majority of the lines have complete power to oppress their competitors within a conference and to destroy them outside it. A non-unanimous amendment rule is inherently a weapon of oppression, and unapprovable under the public interest and detriment to commerce standards of Section 15.

B. The Evidence.

The Commission's second report quotes and adopts the "finding" in its first report, that a less-than-unanimous amendment rule is necessary in order for conferences to function "with as little friction and obstruction as possible" (JA 414).

¹⁸ JAGFC Exclusive Patronage (Dual Rate) Contract, Docket Nos. 1078/1080, 5 SRR529 (1964).

¹⁹ See *infra*, pp. 31-32; 57

²⁰ The amendment was opposed by *States Marine* and others, and was set for hearing. Agreement No. 150-24, TPFCJ, Docket No. 1093. It was then withdrawn by the TPFCJ.

The first decision was made without benefit of hearing, and in finding that unanimity is an impediment to the effective functioning of conferences, the Commission had accepted the argument of conference counsel, who told the Commission (Transcript of Oral Argument, May 1, 1963, p. 17, JA 5):

"... I say that the Commission cannot change our voting procedures unless we are afforded the opportunity to show to the Commission the importance of these procedures and why they are necessary for operation."²¹

After remand, the evidentiary hearing was held, but the conferences spurned the demanded "opportunity to show to the Commission the importance of these procedures, and why they are necessary for operation." Instead, the conferences stated:

"I think the only relevant evidence is whether States Marine voted against this and whether the majority pursuant to conference rules voted for it. On that factual basis, we can then determine whether or not this Section 15 required unanimity as a matter of law" (Tr. 1516; JA 175).²²

It is no coincidence that the conferences refused to produce evidence proving that non-unanimity is indispensable for conference operation. Such evidence is unavailable: the available evidence proves just the opposite. Thus States Marine, which was — and is — perfectly willing to tender the issue as one of law, in deference to the Commission's statements about "friction", produced the following evidence:

1. Exhibits (88 and 89) showing the voting on amendments to the basic conference agreements since the conferences were organized. These exhibits showed that (a) all amendments to the JAGFC agreement since it was first amended in 1939 were in fact adopted unanimously (Ex. 89); and (b) all amendments save one to the TPFCJ agreement since at least 1949 were adopted unanimously (Ex. 88)²³ and that the

²¹ See similar statements at p. 16, Transcript of Oral Argument, May 1, 1963 (JA 5).

²² See similar statements at Tr. 1504-5; JA 175.

²³ One other was adopted with no dissent, but with an abstention (Ex. 88; JA 301).

one adopted non-unanimously was not approved by the Commission (Tr. 1676; JA 201).

In fact, the only amendments known which were adopted on a less-than-unanimous basis²⁴ are the pending neutral body amendments, and the change in voting rules referred to *supra*, p. 22. The first has not been approved, but its mere submission has caused years of unabated and disruptive "friction." The second was investigated by the Commission (Docket 1093) and eventually withdrawn by the conferences.

2. An Exhibit tabulating voting requirements for all approved conference agreements as of March 5, 1965. This exhibit was prepared by Hearing Counsel and was admitted as a late-filed Exhibit (Tr. 1664-66, Ex. 93; JA 199). After examination, States Marine tendered a Correction to Exhibit 93, tagged 93-A. Hearing Counsel in turn offered "corrections" and the Examiner thereupon struck Exhibit 93, but ruled that the parties could refer to the agreements on file with the Commission. These agreements show that:

(a) 69 conferences expressly require a unanimous vote for amendments to the basic conference agreement;²⁵

(b) 14 conferences have less-than-unanimous voting provisions for matters either "within the scope of the agreement", or for conference decisions on specified subjects,

²⁴ Besides Amendment 4 of the TPFCJ, which was never approved (Tr. 1676; JA 201).

²⁵ These conferences are: 50-1; 57; 93; 134*; 161; 194; 2744; 2846; 3302; 3357; 3868; 4188; 4189; 4610; 5200; 5400; 5600; 5660; 5700; 5800; 5850; 6080*; 6190; 6200; 6400*; 6870; 7100*; 7540; 7550; 7580; 7590; 7650; 7670; 7680; 7690; 7700; 7770; 7780; 7810; 7820; 7830; 7860*; 7890*; 7980; 8040; 8050; 8080; 8120; 8130; 8140; 8180; 8210; 8220; 8240; 8290; 8300; 8310*; 8320; 8410; 8530; 8650; 9214; 9364; 9086; 8186; 8493; 8735; 8920; 9150. The agreement numbers with asterisks provide for unanimous amendment either by those members present, or of a quorum of all members. The agreement numbers beginning with 8086 are for conference agreements without rate making authority.

but do not expressly specify the voting percentage required for amendments to the agreement;²⁶

(c) 18 conferences expressly permit a less-than-unanimous vote for amendments to the basic conference agreement.²⁷

To summarize: Eighty-three percent of all conferences approved in the foreign commerce of the United States operate under a unanimous amendment rule.²⁸

3. Unrebutted testimony showing that the membership of the conferences is substantially similar to the membership of the Pacific Westbound and Far East conferences (both outbound) which do function under a unanimous amendment rule. Thus these same lines have been able to reconcile their divergent interests and operate with little friction and obstruction in westbound Japan trades: no reason appears on this record why it is impossible eastbound.

The evidence established (a) that the conference's agreements, as frequently amended and as now in force, would not be one whit different if a unanimous-amendment rule had been in force from the very beginning;

²⁶ These conferences are: 17; 59; 90; 5450; 6800; 6900; 7200; 7630; 7640; 8090; 8160; 8420; 8470; 9293. The Far East Conference (No. 17) is one of the agreements in category (b), and provides for a majority vote on all matters within the scope of the agreement, but is silent as to the percentage required for amendments to the basic agreement. The Far East Conference in fact operates under a unanimous amendment rule (Tr. 1584; JA 191).

²⁷ These conferences are: 14-1; 85; 150; 191; 192; 3103; 5300; 6010; 6060; 7090; 7190; 8100; 8190; 8250; 8260; 8660; 8595; 8670. The last two agreement numbers are for conferences without rate making authority.

²⁸ $69 + 14 = 83$; $83/102 = 83\%$. The 14 conferences in category (b) do not specifically state what voting percentage is required for amendments to the agreement, but do specifically provide for a less-than-unanimous vote, on matters "within the scope of the agreement." It is clear that an amendment to an agreement is not "within the scope" of the agreement. Thus the agreements of the 14 conferences which have no specific voting amendment rule are amendable only by unanimous agreement. This interpretation is confirmed by the record: the Far East Conference, which is one of the 14, in fact operates under a unanimous amendment rule (Tr. 1584; JA 191).

(b) that the overwhelming majority of conferences operating in the foreign commerce of the United States utilize a unanimous amendment rule; and (c) that the member lines of the TPFCJ and JAGFC function together with a unanimous amendment rule in conferences covering other trades. We submit that these facts completely invalidate the Commission's finding in its first report that the less-than-unanimous amendment rule is "important" or "necessary" in order to "reconcile a number of divergent interests" and to operate "with as little friction and obstruction as possible", and that the re-adoption of that finding is completely unsupported by substantial evidence on this record as a whole.

The Commission's report gives no hint of the existence of this evidence. Instead, the Commission, after quoting its first report, said (JA 415): "States Marine has offered nothing which causes us to change our views as expressed above." We submit that labelling detailed, documented evidence as "nothing" without even stating what it is is no substitute for a reasoned decision supported by substantial evidence on the record as a whole.²⁹

II. THE COMMISSION COULD NOT APPROVE, UNDER SECTION 15 OF THE SHIPPING ACT, 1916, AMENDMENTS WHICH WERE (A) NOT NOTICED FOR HEARING, AND (B) EXCLUDED FROM EVIDENCE

Neutral Body System #3 (Agreements 150-29 and 3103-26) was offered into evidence as Exhibits 82 and 83 on February 16, 1965, by Conference Counsel without supporting witnesses and after the hearing was nearly concluded (Tr. 1553; JA 178). The Examiner rejected the admission of the exhibits as evidence (Tr. 1560-61; JA 182-83):

²⁹ As a subsidiary issue, States Marine objected to the form of signature whereby all lines are listed in submitting amendments for approval, with no indication which lines did not adopt the amendment. The Commission's first report agreed — and found the form "misleading at best" (JA 19). In its only change-of-heart since its first decision, the Commission now agrees with its Examiner and finds it not "actually misleading" (JA 416). The Commission does not say why it was misled the first time but not the second.

"The order of investigation is very specific. I do not think that it is within my authority to expand it to include further amendments."

On March 3, 1965, Conference Counsel sought the qualified admission of Exhibits 82 and 83 (Tr. 1692; JA 202):

"... I ask at this time that those two exhibits be admitted into evidence for the sole limited purpose of showing evidence of States Marine Lines' motivations in opposing the said conference provisions."

The Examiner ruled (Tr. 1694; JA 203):

"82 and 83 will be received, but for the very specifically limited purpose indicated by Mr. Warren [Conference Counsel]."

The Conference filed a motion to reopen the proceeding to include Neutral Body System #3 in the hearing. The motion was opposed by States Marine and denied by Order of the Commission served March 31, 1965:

"The record in this lengthy proceeding has been closed. An incorporation of the Conferences' latest modification would require that record to be reopened and new evidence heard . . ." (JA 328).

The status of the administrative record is clear — the proposed amendments were not admitted into evidence (except to show States Marine motivation). Thus it was improper for the Initial Decision to recommend approval of Neutral Body System #3; this impropriety was compounded by the Commission's decision approving them (JA 393).

The Examiner said he could consider the amendments because the Order denying admission also stated that counsel could add proposals for modification of the agreements in their briefs and the Commission decision would "resolve the issues" considering "all proposals by counsel." The Examiner, however, ignored that portion of the Order that said "the record . . . has been closed"; "incorporation of . . . modifications would require . . . reopening [the record]."

Faced with this discrepancy between the Order and the Initial Decision, the Commission thought it found a way out (JA 400):

"... [O]ur authority under Section 15 of the Act is not simply the sterile power to accept or reject that which parties to agreements file with us. Section 15 expressly grants us the power to modify agreements filed with us."

This entire case deals with the denial of safeguards afforded a party to a conference. It would be ironic if States Marine were denied these same safeguards in the resulting administrative proceeding. The position of the Commission in approving the proposed amendments, although they were not in the record for approval, is patently inconsistent with established principles of administrative law, and denied States Marine a fair hearing. And, as will be shown, the Commission's authority under Section 15 of the Shipping Act, 1916, offers no statutory justification for the Commission's action.

The landmark case establishing the scope of judicial review of administrative proceedings under the Administrative Procedure Act, 5 U.S.C. 1001-10 is *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951). There the Court said the standard to be applied is whether, considered as a whole, the record in the case contains substantial evidence to support the findings. This principle has been applied to review of Section 15 Agreements.³⁰ And under this standard there is no choice but to overturn the Commission decision, as the Commission approved amendments which were specifically excluded from evidence (except to show States Marine's motivation) and never became part of the record.³¹

³⁰ *Alcoa Steamship Co. v. F.M.C.*, 321 F.2d 756, 759, note 7 (C.A.D.C., 1963).

³¹ The dissenting opinion of Commissioner John S. Patterson recognized the error (JA 420):

"... we have already excluded Agreements Nos. 150-29 and 3103-26 by our order served on March 31, 1965. We have not issued any order opening the record for their admission. The latter agreements may not at the same time be excluded by order and included by considering and approving them anyway.... [W]e may only make decisions upon material issues of fact presented in the record if we are to obey section 8 of the Administrative Procedure Act."

To avoid a confrontation with the requirement of a decision supported by evidence "in the record", the Commission implied that the proposed amendments could be considered anyway since "they have been filed with us for our approval" (JA 400). But the mere filing of the proposed amendments with the Commission adds nothing and does not make the amendments part of the "record." "Nothing can be treated as evidence which is not introduced as such." *U.S. v. Abilene and S. Railway Co.*, 265 U.S. 274 (1924); *I.C.C. v. Louisville and Nashville R. Co.*, 227 U.S. 88, 91, 93 (1913); *Chicago Junction Case*, 264 U.S. 258 (1924). And "papers on the Commission files are not a part of the record in a case, unless they are introduced as evidence." *The New England Divisions Case*, 261 U.S. 184, 198, note 19 (1923); *U.S. v. Abilene and S.R. Co.*, 265 U.S. 274, 288 (1924). "The practice of noticing evidentiary material after the case has been submitted amounts to a 'pretext for dispensing with the trial.' *Ohio Bell Telephone Co. v. P.U.C.*, 301 U.S. 292 (1937)]. . . ." *Cook v. Celebrezze*, 217 F. Supp. 366 (W.D. Mo., 1963).

The statement in the Commission Order excluding the proposed amendments but inviting "proposals" from Counsel in their briefs to be considered in making the decision, shows a misunderstanding of what the "record" is.³² Decisions *must* be supported by evidence in the record — not in briefs. *Norris and Hirshberg v. S.E.C.*, 163 F.2d 689 (C.A.D.C., 1947), cert. denied, 333 U.S. 867.³³

³² Courts do not take the composition of the record as lightly as did the Commission. The mere physical absence of material exhibits from the file during the decision-making period may be sufficient to require a reconsideration of a decision. *S.D. Warren Co. v. NLRB*, 342 F.2d 814 (C.A. 1, 1965).

³³ "In considering a case such as this, the Commission might have before it four sorts of documents: the pleadings, a transcript of the evidence, briefs of counsel, and memoranda prepared by members or subordinates. It is well established that only the pleadings and the evidence constitute the record upon which the decision must be based. Briefs and memoranda made by the Commission or its staff, are not part of the record." (163 F.2d at 693).

Finally, the lament of the Commission that (JA 400):

"Exclusion of the proposed amendments would achieve nothing more than a delay in their ultimate consideration.",

is in conflict with *Ohio Bell Telephone Co. v. P.U.C.*, 301 U.S. 292, 305 (1937) where Mr. Justice Cardozo said:

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement [of a fair hearing] has been neglected or ignored."

The Commission attempted to bypass its obligations to decide the case on the basis of the evidence of record by relying on its modification powers under Section 15:

"[O]ur authority under section 15 of the Act is not simply the sterile power to accept or reject that which parties to agreements file with us. Section 15 expressly grants us the power to modify agreements filed with us." (JA 400).

But Section 15 says:

"The Commission shall by order, after notice and hearing, disapprove, cancel, or *modify* any agreement . . . *that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.*" (Italics supplied)

In *Aktiebolaget Svenska Amerika Lines v. Federal Maritime Commission*, 351 F.2d 756 (C.A.D.C., 1965), this Court reversed a Commission order disapproving a section 15 agreement because the Commission had not made one of the statutory findings prerequisite to disapproval:

"The statutory language authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of the four ways set out in the section by Congress." (351 F.2d at 761).

There is no distinction in the statutory language between disapproval or modification: before the Commission may modify, it must also make a finding, on the agreements tendered it for approval, as to discrimination, detriment to commerce, inconsistency with the public interest, or violation of the Act. There is not one word in the Commission's decision indicating that the Commission found neutral body system #2 deficient under the statutory criteria, and it therefore had no power to modify it by adopting the provisions of neutral body system #3. The Commission's purported approval of neutral body system #3 was unlawful.

III. THE STEAMSHIP INDUSTRY'S SELF-POLICING SYSTEM MUST (A) PROVIDE AN UNBIASED TRIBUNAL, AND (B) INCLUDE ADEQUATE PROCEDURAL SAFEGUARDS

A. Neutrality.

1. The Background of the Neutrality Issue.

The Commission's report, pp. 3-5, summarizes the "events which led to the present proceeding" (JA 396); they focused primarily on the neutrality issue, and explain why States Marine, of all the member lines in these conferences, is so insistent that the neutral body be unaffiliated with the accuser, or any other conference member.

As the Commission's report states, States Marine has been in constant litigation with the TPFCJ since 1959. That litigation was the subject of testimony in this proceeding by States Marine witness Carpenter (JA 41-49); it is also set forth in the court decision which finally settled it — *Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission*, 314 F.2d 928 (C.A. 9, 1963) — until the present amendments were filed, reopening it anew. In *Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission*, the Court of Appeals for the

Ninth Circuit set aside fines totalling \$25,000³⁴ which had been assessed against States Marine by the TPFCJ's first neutral body, LBT, while the Neutral Body (1) was operating without §15 approval, and (2) was secretly employed by a States Marine competitor. The Court found, as had the Commission,³⁵ that because the conference agreement had required that a neutral body be not employed by a member line and the TPFCJ neutral body was so employed, the activities of the neutral body were in violation of §15³⁶ and its fines unenforceable. The Court said:

"...[W]hen the ... [neutral body] undertook to impose fines aggregating \$25,000 upon States Marine, they were obviously doing something which the Board [Commission] could find was operating to the detriment of the commerce of the United States. States Marine was operating in that commerce and a few repetitions of this fining process could easily put it in the hands of a receiver."
314 F.2d at 934.

The Conference's response to this decision was to file the amendments here under review which provide that a neutral body may be employed by a member line, but must disqualify itself if that line is the *accused*. It need not disqualify itself if the employer is the accuser; indeed, as one conference witness so elegantly pointed out — that fact will never be known (Tr. 1044; JA 122).

2. The Commission's Decision.

Although at the beginning of its report, the Commission recited the detriment States Marine suffered with a secretly affiliated neutral

³⁴ The rationale of the decision also invalidated an additional \$10,000 fine imposed by the TPFCJ upon a wholly owned States Marine subsidiary — Isthmian Lines.

³⁵ *States Marine Lines, Inc. v. Trans-Pacific Freight Conf.*, 7 F.M.C. 204 (1962).

³⁶ The Department of Justice brought suit against the conference to collect the statutory penalties of up to \$1,000 a day for violation of §15. *United States v. Trans-Pacific Freight Conf. of Japan, N.D. Calif., So. Div., Civil No. 41349* (1963). The suit was settled for \$25,000.

body, the Commission's two page discussion of "Neutrality" omits any mention of these experiences, and draws no conclusions based thereon. Instead, the Commission (1) cites the testimony of conference witness Ralph S. Johns that neutrality is not required (JA 410) and (2) quotes and adopts the Examiner's findings with respect to neutrality (JA 410-11).

The Examiner's findings, as quoted by the Commission, we set forth in full in the footnote below.³⁷ They are (a) not supported by the record, or (b) irrelevant, if true. We consider them one by one.³⁸

1. "In view of the fact that the Neutral Body functions are actually fact-finding rather than judicial; . . ."

This finding is disproved by the conferences themselves:

(a) The TPFCJ wrote a letter to its first neutral body, LBT, saying that the neutral body "must function as investigator, prosecutor, judge and jury." (Ex. 13, p. 2, italics supplied; JA 240).

(b) Conference witness McCone said the neutral body is a "referee" (Tr. 673; JA 87); it is:

³⁷ "In view of the fact that the Neutral Body functions are fact finding rather than judicial; that the conclusive facts are usually, if not always, obtained from the books of account and records of the accused; that accounting firms are uniquely qualified both professionally and by procedural and ethical standards, to perform this work; that fees are paid on the basis of time devoted to a case, and without regard to whether the complaint of malpractice is sustained or dismissed; that there is no evidence of actual bias or non-neutrality relating to any of the firms heretofore used; and that the application of unduly broad exclusions will disqualify or bring about the disinterest of most, if not all, of the otherwise eligible firms, thereby destroying this self-policing system, contrary to the public interest and to the detriment of commerce, it is found that a Neutral Body should not be disqualified because of a disclosed business relationship, i.e. independent contractor for professional or business services, with a conference member line other than the accused."

³⁸ The testimony of Ralph S. Johns specifically relied on by the Commission, is discussed in connection with the Examiner's findings, *infra*, p. 35.

"an open-minded entity charged not with looking for violations or proving them, but charged with determining the facts on both sides of an individual complaint and coming up with the truth without reference to anything but the truth." (Tr. 674; JA 88).

This, we submit, is an excellent definition of the judicial function.

(c) John Waldroup, who is presently serving for Arthur Young & Co. as the neutral body, said:

"Basically, I view our function primarily as arbitrators or as umpires sitting between two parties" (Tr. 968; JA 109).

All words used by the conference to describe the neutral body — judge, referee, arbitrator, umpire — clearly describe a body which decides controversies and hence performs a judicial function. Indeed the point is scarcely debatable: an entity which decides innocence or guilt and pursuant to that decision metes out punishment is not merely a fact-finder; it is a full-fledged court.

2. "That the conclusive facts are usually, if not always, obtained from the books of account and records of the accused; . . ."

The record shows, in contrast, that evidence comes from many sources, and the neutral body must weigh and assess it before coming to any determination of guilt or innocence. Witness Waldroup specifically stated, in answer to the question whether the evidence of malpractice was found only in the books or records of the accused, that it was found in "anything and everything" (Tr. 1015; JA 118). He stated that evidence is garnered from records or correspondence obtained from a line's employees (Tr. 1018; JA 119), and from oral accusations (Tr. 1065; JA 126).

The point was pressed on cross-examination, and the neutral body witness conceded that in fact, the books of account and records might be ambiguous, and consistent with a theory of guilt or innocence (Tr. 1077; JA 132). In such a case, Mr. Waldroup stated, he would find that a malpractice had occurred on the basis of a letter, purportedly written by an

officer of the accused, stating that a rebate had been given (Tr. 1077-79; JA 132-33).³⁹

Thus the neutral body is not an auditing robot, adding up figures which total G for Guilty or I for Innocent. It gathers evidence from all oral and documentary sources, and makes a determination of guilt or innocence. In such circumstances, the neutral body's affiliations are not only relevant, they are crucial.

3. "That accounting firms are uniquely qualified both professionally and by procedural and ethical standards, to perform this work;"

It is true that accounting firms are uniquely qualified to perform some of the work involved — discovering discrepancies in financial records that may be consistent with rebating. However, accounting firms are not uniquely qualified to perform the judicial functions, and have shown on the record a singular lack of appreciation of judicial qualifications. Both the Examiner and the Commission relied on the testimony of Mr. Ralph S. Johns, Chairman of the Ethics Committee of the American Institute of Certified Public Accountants, to the effect that a member's professional affiliation with a complainant would not impair its independence. Neither the Examiner nor the Commission recited the following testimony of Mr. Johns (Tr. 1431; JA 172).

"Q. Suppose you, yourself, had a complaint against a partner of Price, Waterhouse. Could you lodge that complaint with the ethics committee and then sit in judgment on it?

A. Yes."

Arthur Young shows no more sensitivity to judicial standards. Neutral body representative Waldroup testified that he sees nothing wrong with serving as neutral body in a case where the accuser is his regular

³⁹ It must be constantly remembered that any and all evidence which the neutral body deems might reveal the accuser is never disclosed to the accused.

client because the accuser "is never identified in the course of our work" (Tr. 957; JA 107-8), so no one will know if the neutral body favored its client (Tr. 1044; JA 122). Ironically, the neutral body seeks to avoid "even the appearance" of bias not by being in fact unaffiliated, but by keeping its affiliation with one of the antagonists secret! Mr. Waldroup testified that in pursuing his neutral body functions, he has never had occasion to consult the American Bar Association's Code of Judicial Ethics (Tr. 1135-36; JA 147).⁴⁰

4. "That the conference rather than the accuser is the client;"

Of course the conference is the client in the neutral body — conference relationship. The problem is that the *accuser* is the client in the auditor — steamship line relationship. It is the juxtaposition of the two relationships that creates the conflict.

5. "That fees are paid on the basis of time devoted to a case, and without regard to whether the complaint of malpractice is sustained or dismissed;"

This misses the point. Of course the fee is paid whether or not a malpractice is found, but in the Pacific Westbound Conference and Far East Conference (which employ Arthur Young as neutral body) the fee is paid by the conference or the accused, depending upon whether a complaint is sustained or dismissed. Since the conference is the client, the neutral body sustains its client's treasury if it convicts, and depletes it if it does not. The conference agreements here in dispute do not state who pays

⁴⁰ Such consultation, had it occurred, might well have made Mr. Waldroup less sanguine about his client-accuser affiliation, for Canon 24 of the Canons of Judicial Ethics provides:

"A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions."

No proviso to this Canon appears which allows a judge to assume inconsistent duties or incur pecuniary obligations provided they are secret.

the fee. States Marine's proposal specifically provided that the neutral body's fees and expenses should be paid in all cases by the conference (Ex. 5, p. 2; JA 221).

6. "That there is no evidence of actual bias or non-neutrality relating to any of the firms heretofore used;"

This first neutral body used, LBT, was found to be non-neutral within the definition of neutrality used by the conference itself. *Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission*, 314 F.2d 928 (C.A. 9, 1963). A showing of actual bias is never required under the law for disqualification of judges, arbitrators, or any other kind of decision maker, as we show *infra*, pp. 38-39.

7. "and that the application of unduly broad exclusions will disqualify or bring about the disinterest of most, if not all, of the otherwise eligible accounting firms . . ."

The evidence does not support this statement, but nothing turns on it in any event. Biased judges are not acceptable merely because unbiased judges are scarce. In any event, the present neutral body is unaffiliated, and it lies completely within the conference power to prevent the formation of an accounting relationship with Arthur Young: no member line need offer it the job.

Not one of these findings justifies the conclusion — at odds with all precedent — that the neutral body can be the regular auditor for the accuser and sit in judgment on the accused.

3. The Law.

In its briefs to the Commission, States Marine cited and discussed a number of cases which stand for the proposition that decisions by persons interested — however indirectly — in either the results or the parties involved are invalid. The Commission decision cites not one case in support of its conclusion that a judge of guilt and assessor of fines may be employed by the accuser, a competitor of the party accused.

The cases cited by States Marine were directly in point. They all reject the conference contention and Commission finding that proclaimed ethical standards, rather than affiliation, determine judicial qualification. They all subscribe to "that imperative requisite of even-handed justice proclaimed by Chief Justice Marshall more than a century ago, 'that the judge must be perfectly and completely independent with nothing to influence or control him but God and his conscience'." ⁴¹ They all hold that the qualification of the judge must satisfy an objective test:

"... the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927).

"... an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact..." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549-50 (1961).

The relevant inquiry, under these decisions, is not whether self-interest has *in fact* dictated the decision, but merely whether it *might*:

"... the statute is more concerned with what might have happened in a given situation than what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 550 (1961).

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance, nice, clear, and true between the state and the accused denies the latter due process of law." *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927). Cf. *Holt v. Virginia*, 381 U.S. 131 (1965).

⁴¹ *United States v. Manton*, 107 F.2d 834, 846 (C.C.A. 2d, 1938), cert. denied 309 U.S. 664.

In a case decided since the Commission decision, *Ruiz v. Delgado*, 359 F.2d 718(C.A. 1, 1966), the Court of Appeals for the First Circuit reversed two misdemeanor convictions of a Puerto Rican district court. Under the statutory Puerto Rican procedure, the trial judge conducts the direct and redirect examination of prosecution witnesses, cross-examines defense witnesses, recalls prosecution witnesses for rebuttal, and then decides the case. The Court of Appeals held this procedure inherently unfair (359 F.2d at 720):

"Speaking from long contact with many trial judges, we appreciate that the public spirited and thoroughly impartial judge does not want innocent men to be convicted. Nor, however, does he want the guilty to go free. If a defendant has counsel, and particularly if he has effective counsel, and the people have none, it would be a rare judge who did not, at least unconsciously, seek to set the balance. While he may not be the ardent, striving, advocate that the Commonwealth's brief envisages as a public prosecutor, if he has to see that justice is done for the people's cause, he must, to some extent at least, act as prosecutor.

". . . The mental attitudes of the judge and prosecutor are at considerable variance. To keep these two personalities entirely distinct seems an almost impossible burden for even the most dedicated and fair minded of men."

The standard applied was objective, and the question resolved was not whether district court judges are honorable men, but whether they may perform inconsistent functions.

It is true that the concept of a "neutral body" system makes no provision for separating the judicial and prosecuting functions. How much more urgent it is then, that the prosecutor-judge maintain the strictest neutrality in terms of business affiliation. Given the fact that, as the TPFCJ itself said (Ex. 13, p. 2; JA 240), the neutral body "must function as investigator, prosecutor, judge and jury," at the very least

the accused should not be investigated, prosecuted, judged, and sentenced by a prosecutor-judge who is in the pay of his accuser.⁴²

None of the neutral body systems pass muster under any of these precedents — all ignored by the Commission.

B. Notice, Confrontation, Investigation, Hearing.

1. The Silver Case and the Commission's Decision.

The Commission begins its discussion of the procedure required for industry self-policing by adopting the Examiner's purported "distinction" of *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (JA 402). Then, apparently not satisfied with its own distinction the Commission concludes that the conferences' neutral body systems adhere to the *Silver* requirements with respect to notice, confrontation, and hearing. The Commission is wrong on both counts: the *Silver* decision is directly applicable, and the conferences proposed self-regulation does not measure up to *Silver*.

The parallel between this case and *Silver* is exact: here, as in *Silver*, there was a history of abuses in an industry; here, as in *Silver*, the Congressional scheme was to let the industry take the "initiative" in curbing such abuses, while the regulatory agency was to "step in" where the industry was ineffective; here, as in *Silver*, the regulatory agency has power to disapprove or modify the industry's self-regulatory rules, but has no power to review particular instances of self-regulation; here, as in *Silver*, the principle must follow that "in acting without according . . . these safeguards . . . [notice and hearing] the [Conference] . . . plainly exceed[s] the scope of

⁴² The *Silver* case did not involve the conflict of interest question. However, a Supreme Court decision rendered after *Silver*, and in reliance on it, did present that issue: *Securities & E. Com'n. v. Capital Gains Research Bureau*, 375 U.S. 180 (1963). The Court held in that case an investment advisor's purchase of shares in a stock which he touted to his customers was a deceit, even if the investment advisor's opinion was scrupulously honest. The ethical standard applied was objective, not subjective, and the Court relied on *Silver* as precedent establishing the need for such a standard (375 U.S. at 186-87).

its authority under the...[Shipping Act], to engage in self-regulation . . ."

373 U.S. at 365.

It would seem unnecessary to emphasize this parallelism were it not for the Commission's attempt to make *Silver* evanesce. The distinctions are set forth on JA 402, and we consider them one by one:

1. "Moreover *Silver* is distinguishable from the instant proceeding on a number of legal and factual grounds . . . ⁴³ It was an antitrust case, this is not . . ."

The question in *Silver* was whether an Exchange can function with antitrust immunity when punishing an alleged violator of Exchange rules without according him certain procedural safeguards. This is *precisely* the question involved here. If the Commission approves the procedure proposed, the conferences are immunized from antitrust liability; if it does not, and the procedure is utilized, the conferences are at large under the antitrust laws. It is true that here the Commission has the responsibility of determining what procedures the conferences must follow to gain antitrust immunity, whereas *Silver* arose when no such directives to the Exchange had been issued by the Securities and Exchange Commission. *But the Supreme Court said in Silver that the Securities and Exchange Commission could have issued rules requiring the Exchange to adopt the procedures set forth by the Court, adding that such rules, "to be consonant with the antitrust laws, have to provide as a minimum the procedural safeguards which those laws make imperative in cases like this."* (373 U.S. at 364, fn. 16; italics supplied). ⁴⁴ Thus the anti-trust

⁴³ These three dots are in the original decision, and do not here signify the omission of any text.

⁴⁴ The full footnote reads:

"It may be assumed that the Securities and Exchange Commission would have had the power, under §19(b) of the Exchange Act, 15 U.S.C. §78s(b), pp. 1254-1255, 1257 & Note 7, *supra*, to direct the Exchange to adopt a general rule providing a hearing and attendant procedures to non-members. However, any rule that might be adopted by the Commission would, to be consonant with the antitrust laws, have to provide as a minimum the procedural safeguards which those laws make imperative in cases like this. Absent Commission adoption of a rule requiring fair

(Continued)

aspects of both cases are parallel; both industries may obtain anti-trust immunity for self-policing activities *provided fair procedures are employed*. The difference is that the Commission was presented with the opportunity of imposing those procedures instead of having them imposed by a Court, whereas the *Silver* case arose before the Securities and Exchange Commission had set forth procedures embodying safeguards sufficient to immunize the Exchange from anti-trust liability. This difference scarcely justifies a Commission refusal to provide the procedural safeguards which the Supreme Court termed "imperative."

2. "States Marine is a member of both respondent conferences, Silver was not a member of the Exchange. . . ."

The member - non-member distinction was much pressed by the conferences: on examination, it turns out to be a distinction without a difference. It is certainly as much, if not more, of an anti-trust violation to retaliate collectively against a competitor as it is to retaliate collectively against a customer. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Company*, 364 U.S. 656 (1961). Thus the fact that States Marine is a member of the conferences whereas Silver was not a member of the Exchange does not remove this case from the Supreme Court's precept that there is "no justification for anti-competitive collective action taken without according fair procedures." (373 U.S. at 364).

Again the *Silver* case is directly in point: the Supreme Court, noting that the Exchange did accord procedural safeguards to Exchange members, stated that there is as much need "to deal with member wrongdoing as with that of a nonmember" (373 U.S. at 363, ftn. 15). Thus *Silver* is hardly authority for the proposition that procedural safeguards are required when an industry regulates its customers, but not when an industry

44 (continued)

procedure, and in light of both the utility of such a rule as an antitrust matter and its compatibility with securities-regulation principles, see p. 1259, *supra*, no incompatibility with the Commission's power inheres in announcement by an anti-trust court of the rule. Compare *Colorado Anti-Discrimination Comm. v. Continental Air Lines, Inc.*, 372 U.S. 714, 723-724, 83 S.Ct. 1022, 1026-1027." (Emphasis supplied).

regulates itself. On the contrary, the Court supported its decision in *Silver* by approbative reference to the safeguards inhering in Exchange punishment of Exchange members.

3. "The Shipping Act specifically excepts agreements approved thereunder from the antitrust laws; the Securities Exchange Act does not. . ."

It is true that this Commission has the specific power to approve agreements among persons subject to the Shipping Act, thereby exempting them from the anti-trust laws, whereas such power is not specifically conferred on the Securities & Exchange Commission.⁴⁵ Indeed, the *question* in *Silver* was whether there is any anti-trust immunity at all for anti-competitive Exchange behavior. The district court held that there was none, and the Exchange's behavior was a *per se* violation of the anti-trust laws. 196 F. Supp. 209 (D.C.N.Y., 1961). The Court of Appeals reversed, holding that the Exchange had complete anti-trust immunity to discipline members and nonmembers under the Securities & Exchange Act. 302 F.2d 714 (C.A. 2, 1962). The Supreme Court took a middle course, holding that there was an implied repeal of the anti-trust laws to the minimum extent necessary to make the Securities Exchange Act work. 373 U.S. at 357. The Court held that the Securities Exchange Act would not work in the absence of fair procedures, and that action taken without such fair procedures is therefore not immunized from anti-trust liability. Thus the Exchange procedures, *if fair*, are excepted from the anti-trust laws. This was the exact holding of *Silver*.

The only real difference between this case and *Silver* is that the antitrust exemption for the Exchange comes about by virtue of the Court's decision interpreting the statute (Securities Exchange Act), whereas the exemption for the conferences comes about by virtue of the language of the statute (Shipping Act). We fail to see how this difference can or should result in different procedures for Exchange self-regulation than for conference self-regulation.

⁴⁵ This distinction is relevant, as we show below, pp. 61-62, to the problem of the right to appeal from the neutral body decision.

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⁴⁵ This distinction is relevant, as we show below, pp. 61-62, to the problem of the right to appeal from the neutral body decision.

4. "The problems and considerations having to do with stock exchange self-regulation differ materially from those having to do with steamship conference self-regulation . . ."

This conclusion is supported by no examples of any material problems and considerations pertaining to one industry as opposed to the other. It is completely inaccurate. The relevant problems and considerations are virtually identical: the problems which led Congress to authorize self-regulation in both industries were strikingly similar, and the method of self-regulation authorized was perfectly parallel. Congress found that both Exchanges and conferences could and did wield monopoly power;⁴⁶ Congress determined nevertheless to allow both industries to reform themselves by punishing wrongdoers; and Congress gave the agency regulating each industry power to step in where the industry failed to do the job.⁴⁷ While both the SEC and the FMC have the power to set forth rules for self-regulation, neither has jurisdiction over any particular disciplinary action. Consequently, it is as important in one case as in the other that the judgments of the self-policing agency be reached under fair procedure. The Commission offers no hint as to why fairness is good for stockbrokers and bad for shipping companies.

5. "notice and hearing, the only two specific 'safeguards' in issue in *Silver*, are expressly provided for under the conferences' proposed system . . ."

This is really not a "distinction", but a statement that the neutral body system comports with *Silver*. That argument is restated later, where notice and hearing are specifically discussed, and we will deal with it *infra*, pp. 47-52.

⁴⁶ The Congressional investigations and determinations relating to the securities business are spelled out in *Silver*, 373 U.S. at 351-52. In the steamship industry, they are narrated in the Celler Report; see particularly pp. 362-63.

⁴⁷ 373 U.S. at 352; Section 15, Shipping Act, 1916, 46 U.S.C. §814: "The Commission shall disapprove any such agreement . . . on a finding of inadequate policing of the obligations under it . . ."

6. "and States Marine chose to join the conferences thereby surrendering some sovereignty."

The statement that States Marine's connection with the conferences is purely voluntary is immediately contradicted by the Initial Decision, which went on to state:

"In considering the true freedom of the choice available to States Marine, one must bear in mind that it may not, as a practical matter, be able to operate outside the conferences in the inbound trades from Japan when and if their dual rate systems go into effect. Nonconference lines will then be precluded from carrying cargoes for shippers that sign conference dual rate contracts." (I.D. 10; JA 345).

The Commission omits this quotation from the Initial Decision. States Marine's choice is "as a practical matter" no choice at all, if it wants to stay in the trade. Neither was Silver's choice to maintain private wire connections with the Exchange:

"Without the instantaneously available market information provided by private wire connections, an over-the-counter dealer is hampered substantially in his crucial endeavor — to buy, whether it be for customers or on his own account, at the lowest quoted price and sell at the highest quoted price. Without membership in the network of simultaneous communication, the over-the-counter dealer loses a significant volume of trading with other members of the network which would come to him as a result of his easy accessibility." 373 U.S. at 348.

Thus for both Silver and States Marine, the connection with the industry organization is a business necessity and cannot be treated on the same terms as membership in a country club.

The Commission and its Examiner both showed a basic misunderstanding of the nature of the rights laid down by *Silver* for industry self-regulation. The Commission says (JA 402), quoting its Examiner, that *Silver*:

"clearly supports a requirement for fundamental fairness in industrial self-policing systems, but not for the so-called defensive safeguards and techniques historically identified with constitutional due process of law."

The Commission sees "fundamental fairness" as a less encompassing term than due process of law: safeguards necessary to insure due process are, according to the Commission, not necessary to insure fundamental fairness. This is a basic misunderstanding of due process.

Due process is not an *a priori* set of rigid legal requirements. It is a *conclusion* based on precisely what is fair and what is not fair. A fundamentally fair hearing is no different from a due process hearing; if a hearing is required to assure an accused — before whatever tribunal — due process of law, it is because the action contemplated without a hearing would be fundamentally unfair. In determining whether denial of representation by counsel was a denial of due process, Mr. Justice Black stated, in *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) that the question turned on whether representation by counsel was a "fundamental right, essential to a fair trial."

Throughout, the Commission purports to contrast States Marine's due process philosophy with the standards of fairness prescribed by *Silver*: the assumption is that due process standards are more stringent than fundamentally fair standards. But that is not so: denial of the right to counsel was held a denial of due process in *Gideon v. Wainwright* precisely because it was fundamentally unfair.⁴⁸

If notice, hearing, confrontation, and cross-examination are "due process" rights, it is because denial of those rights is fundamentally unfair.

But it is not even necessary, so far as most of the rights discussed herein are involved, to go beyond *Silver*. We start with the proposition, incontestably established by *Silver*, that an industry cannot regulate itself

⁴⁸ Similarly, televising of a trial was held a denial of due process in *Estes v. Texas*, 381 U.S. 532 (1965) because it denied the defendant a fair trial. The accused there contended, and the Supreme Court agreed, "that the time-honored principles of a fair trial were not followed in his case and that he was thus convicted without due process of law." 381 U.S. at 535.

with anti-trust immunity unless it provides, for example, notice of the charges against an accused. Whether this requirement is called "due process" or "fundamental fairness" simply does not matter. The notice required under one term can be no more nor less than the notice required under the other. Notice which does not lay "bare the charges" (373 U.S. at 362) is *fundamentally unfair* under *Silver*. Under *Gideon v. Wainwright*, it is therefore a lack of due process: *but whether it is or is not a lack of due process is irrelevant*. It falls short under *Silver*, and there the inquiry should end, because the purpose of the remand was to apply the *Silver* precepts.

2. The Evidence and the Law.

a. Notice.

There are two questions, sometimes confused, concerning notice — (1) when? and (2) how much? The Commission's decision is concerned only with when, and says it must not be given prior to investigation, or evidence will be concealed (JA 404). States Marine was primarily concerned with how much — since the amendments require only that the neutral body tell the accused "the nature of the indicated breach, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose" (Ex. 1, p. 6; JA 215). The Commission says that this "provision" satisfies the fundamental fairness requirements of *Silver*. How can a provision which does not guarantee that any information will be imparted allow an accused any opportunity for meaningful defense? Such "notice" is comparable to an indictment which reads "Robbery" — without stating when, where, or of whom.

These are not theoretical objections on States Marine's part. The un rebutted evidence showed that, in the Pacific Coast European Conference, States Marine was fined, under protest, for an alleged malpractice. The only specification of charges it received was that a rumor existed that a States Marine agent had given a rebate in Europe to an unidentified person (Tr. 1235; JA 151). Of course, with such notice, States Marine

could not defend itself — a circumstance which did not in the least impede the assessment of a fine.

The question of when the notice is given is also critical to the accused's ability to render a defense. Neutral Body System #2 tipped the conferences' hand: it provided for notice *after* the neutral body had arrived at a tentative decision of guilt — whereupon the accused has 15 days (more in the "sole discretion" of the neutral body) to change the neutral body's mind. A steamship line operating in world-wide commerce cannot make its own investigation and prepare a defense in the time allowed — even assuming it knew what it was being charged with, which it does not. Again, this is not merely a theoretical objection: States Marine was fined by the TPFCJ's first neutral body *before* States Marine even found out what it was accused of! (Tr. 376-77; JA 63-64).

The Commission concern about "concealing incriminating evidence" is the first of many phony excuses for short-changing the accused. The present "neutral body", John Waldroup (of Arthur Young & Co.) testified unequivocally that, when arriving for a surprise investigation, he looks for evidence only in conventional repositories. The neutral body does not and cannot search the premises; it is not equipped to do so (Tr. 1091-93; 1096; JA 136-38); it investigates files that are kept in the ordinary course of business and looks for them only in the usual places (Tr. 1092; JA 136).

If a line is disposed to hide evidence, it will do from the moment it signs a neutral body agreement. On the other hand, if a line's files kept in the normal course of business show evidence of a rebate, admittedly not in easily detectable form, those same regular files will exist and be available regardless of any notice; the neutral body witness does not claim that the notice will result in any doctoring of the available accounts or memoranda, and indeed explicitly *denied* that this would happen.⁴⁹

⁴⁹ "Q. What I am getting at, and it is really a simple question, is the danger in the notice provision that records will be hidden or is the danger that they will be phoned?

A. The danger is that they will be hidden" (Tr. 1097; JA 138).

Therefore, the giving of notice can neither add to nor detract from the supply of available evidence.

In the end, the question of notice revolves around whether the accused is to be given a chance to answer the charge or not. The conferences' position on that was clearly set forth by Mr. McCone, a Conference witness:

"Q. Do you contemplate that the accused line should have any means of defending itself?

A. Not necessarily, no" (Tr. 581; JA 84).

b. Confrontation.

The Commission's discussion of confrontation contains (1) the conclusion that *Silver* requires only that the accused be told of the charge, not the information in support of the charge (JA 406); (2) the statement that other cases requiring confrontation cited by States Marine involve "criminal rights or government action" and are not applicable (JA 406); (3) the finding that confrontation, and disclosure of information, will stifle complaints because the complainant will alienate the preferred shipper by informing upon him (JA 407); (4) the conclusion that in any event the injunction to the neutral body to keep in mind "basic precepts of fair play" assures the accused that "the elements of fundamental fairness" will be observed (JA 407). We consider each of these statements in turn.

1. The point of the *Silver* language (quoted by the Commission at JA 406)⁵⁰ was that a requirement of disclosure (1) inhibits unfounded accusations; and (2) enables an accused to rebut the evidence. Obviously, the first purpose cannot be furthered if the accuser's identity, and all information that would disclose it, is kept confidential. Neither can such

⁵⁰ "In addition to the general impetus to refrain from making unsupportable accusations that is present when it is required that the basis of charges be laid bare, the explanation or rebuttal offered by the nonmember will in many instances dissipate the force of the ex parte information upon which an exchange proposes to act." 373 U.S. at 362.

secrecy permit any rational rebuttal: how "dissipate the force of the *ex parte* information" if it is not disclosed? We agree with the Commission that the information may properly be made the basis of the charge (JA 406) — but *Silver* said: "It is required that the *basis* of charges be laid bare." This basis is precisely the *ex parte* information. Unless all the information relied on, including its source, is disclosed to the accused, the basis of the charge is *not* laid bare and the requirements of *Silver* are not met.

2. It is absurd to say that cases requiring confrontation and cross-examination are not applicable because they involve governmental, not private action. First, if the inquiry is as to "fundamental fairness" then obviously all cases inquiring whether a trial — be it criminal, governmental or "private" — can be fundamentally fair without confrontation are directly in point. Second, the private action-government action distinction does not withstand analysis here, because (1) the conferences can utilize the neutral body procedure *only* by virtue of government approval; and (2) adequate self-policing is *required* by the government in §15.

Thus the teaching of *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) is directly in point:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.'

This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e.g. [citations] . . . *but also in all types of cases where administrative and regulatory actions were under scrutiny.* [citations] . . . *Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation.* [citations]" (Italics supplied)

So is *In Re Oliver*, 333 U.S. 257, 273 (1948);⁵¹ and *Pointer v. Texas*, 380 U.S. 400, 405 (1965).⁵²

In fact, the most telling indication of whether the law considers confrontation and cross-examination necessary for a fundamentally fair system is the fact that the conference, in its brief to the Examiner, relied on *Betts v. Brady*, 316 U.S. 455 (1942) as precedent for its position that confrontation is dispensable (Brief of Respondents, 5/3/65, pp. 34-35; JA 331). The conference did not inform the Examiner of the existence of *Gideon v. Wainwright*, 372 U.S. 335 (1963), an oversight remedied by States Marine (Brief of States Marine, 5/24/65, p. 5; JA 333). Conference reliance on discarded precedent proves beyond doubt that the conference position, adopted by the Commission, flies in the face of prevailing judicial concepts of fairness.

3. The Commission finding that disclosure would inhibit complaints is, again, a phony excuse. It is entirely illogical to suppose that no lines will complain in the open about suspected rebates. If line A is rebating to shipper A, it is presumably securing shipper A's business. Line B, which does not rebate, is therefore not securing any. Line B

⁵¹ "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

⁵² "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

has nothing to lose by openly complaining about the rebate, since it cannot lose an account which it is not handling. On the contrary, it has everything to gain from being identified as the accuser, since shipper A's competitors are placed at a competitive disadvantage because of shipper A's lower transportation costs, and would be grateful to line B for disclosing and curing the discrimination.

4. This record provides startling and conclusive evidence that the neutral body's concept of "fair play" provides no assurance whatsoever to the accused that he will not be found guilty of a malpractice on the basis of undisclosed evidence which he was never given the opportunity to rebut. At the hearing Mr. Waldroup, who is presently serving as neutral body, gave the following testimony on that precise point (Tr. 1078-79; JA 132-33):

"Q. Is it difficult to conceive of a situation where the evidence that tips the scales is evidence that cannot be disclosed under your obligation to keep the identity of the accuser secret?

A. Yes, yes.

Q. Is it difficult to conceive --

A. No, no, it can be conceived, it is conceivable that that is the evidence that tips the scale.

Q. In such a situation, do you dismiss the complaint or do you find that a malpractice has occurred?

A. In such a situation, we would find -- and depending on the circumstances, we would find that based upon the preponderance of evidence, that a malpractice has occurred, if that is what the evidence shows.

Q. I have tried to be very clear that if you consider the undisclosed evidence, the preponderance of evidence is that the malpractice has occurred, without the undisclosed evidence, the scales are equally weighted? In that circumstance, what do you do?

A. We would be inclined to find that a malpractice has occurred."

The evidence of record, and the applicable legal precedents, compel the holding that the steamship industry cannot operate under a self-disciplining system that denies the accused the right to know the evidence against him, to confront his accuser, and cross-examine him.

c. Investigation.

The States Marine proposal (Ex. 5, p. 3, JA 222) provided that the accused, after receiving notice of a complaint, shall have the option of requesting that the investigation of its financial records and accounts be made by its own auditors under the neutral body supervision and direction. The Commission rejects this proposal as an "unwarranted assumption that the Neutral Body will make . . . unauthorized disclosures of States Marine's business affairs" (JA 407). The Commission does not set forth the evidence of record, which showed (1) that such approval was necessary in order to guarantee some measure of privacy to a steamship line which is a member of dozens of conferences; (2) that the States Marine proposal is in effect and has worked well in other conferences; and (3) that it was endorsed by none other than conference witness Waldroup, the present neutral body.

States Marine witness Carpenter testified that the provision for giving the accused the right to select its own auditors to work under the Neutral Body's direction, in connection with examination of accounts or financial records, is in effect in several conference agreements "and has not impeded the effective functioning of any Neutral Body" (Tr. 153; JA 52). Since States Marine is a member of many conferences with neutral body systems, omission of this provision subjects States Marine to the hazard of exposing its confidential business affairs to many persons (Tr. 1206; JA 149). The line's own auditors, in making the investigations, would of course work under the Neutral Body's direction and control (Tr. 181; 1207-08; 1210-11; JA 55; 149-50). Mr. Carpenter's testimony was confirmed by Mr. Waldroup. Mr. Waldroup stated he had no objection to having the regular auditors' help under the neutral body's control and supervision (Tr. 992; JA 115-16); that the regular auditors do know the accused's accounting records or procedures (Tr. 1053-54; 988; JA 123-24; 113) that they would not provide false or incomplete information (Tr. 1052-53; JA 123); and that they would not hide files (Tr. 1054-55; JA 124). The suggested procedure is in fact utilized in the Pacific Westbound Conference

and in the Far East Conference, which employ the same neutral body — Arthur Young — as the TPFCJ and JAGFC, and comprise most of the same lines.

The only objection to having the assistance of a line's own auditors during the investigation is that it would necessitate the giving of notice of a complaint. If the Commission agrees that notice must be given in any event, there is no reason not to guarantee the lines some measure of privacy by restricting the actual examination of financial records and accounts⁵³ to one auditing firm.

d. Hearing.

The conferences' concept of hearing has undergone some revisions in the various neutral body systems proposed,⁵⁴ but none provides for the elements States Marine deems essential: disclosure of evidence; opportunity to confront, cross-examine, and rebut. The Commission correctly interprets States Marine's objections to the hearing provisions as incorporating again the problems caused by lack of disclosure and confrontation — and then, in a sentence reminiscent of the best of Lewis Carroll, says (JA 408):

"Again, States Marine urges that there can be no fair hearing or opportunity to explain when there is no guarantee that an accused will be adequately informed of the charges or of the evidence supporting such charges and again it is our view, if the accused is not sufficiently informed of the charges against him and the

⁵³ The utilization of a line's own auditors is requested only for financial records and accounts, not for memoranda or correspondence in general.

⁵⁴ Neutral Body System #1 provides for no hearing whatsoever (Ex. 21, p. 10; JA 263-65). Neutral Body System #2 provides for a hearing after the neutral body has arrived at a "tentative decision" of guilt — a hearing at which only so much evidence is revealed as the neutral body chooses to disclose "in its absolute discretion" (Ex. 1, p. 6; JA 215). Neutral Body System #3 has a hearing after the neutral body determines that there are reasonable grounds to believe a breach has occurred: the disclosure is limited to evidence which does not "reveal the identity of the complaint or otherwise jeopardize the confidentiality of the Neutral Body's sources of information." (Ex. 82, p. 6; JA 286).

evidence in support thereof so as to prepare his rebuttal, the elements of fundamental fairness are missing."

It is certainly true that if the accused is not sufficiently informed of the evidence against him, the elements of fundamental fairness are missing. It should therefore follow (1) that he must be so informed; and (2) that because the conference amendments provide he will *not* be so informed, they should be disapproved. Instead, the Commission ends its discussion there and approves them!

The *Silver* decision was replete with statements stressing the need for notice and hearing in collective industry self-regulation.⁵⁵ By contrast, this record is replete with testimony that so far as the conferences are concerned, a hearing is a meaningless ritual. Conference witness Cocke saw no need to test whether evidence is fabricated by showing it to an accused, because "the neutral body — if he is worth being appointed, is going to discover that" (Tr. 846; JA 100); and that he and the conference have confidence that "justice prevails" in such a situation (Tr. 912-13; JA 103). Conference witness McCone stated that the "so-called hearing . . . should come rather late in the game" (Tr. 589; JA 85). And Mr. Waldroup, presently serving as neutral body, felt that a hearing "is

⁵⁵ ". . . it is clear that no justification can be offered for self-regulation conducted without provisions for some method of telling a protesting non-member why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position. No policy reflected in the Securities Exchange Act is, to begin with, served by denial of notice and an opportunity for hearing." (373 U.S. at 361)

* * *

". . . the utilization of a notice and hearing procedure with its inherent check upon unauthorized exchange action will diminish rather than enlarge the likelihood that such liability will be incurred and hence will not interfere with the Exchange's ability to engage efficaciously in legitimate substantive self-regulation." (373 U.S. at 362)

* * *

". . . It is perfectly clear that the Exchange can offer no justification under the Securities Exchange Act for its collective action in denying petitioners the private wire connections without notice and an opportunity for hearing . . ." (373 U.S. at 365)

more of a formality than anything else" (Tr. 1099; JA 138); "it is a simple matter of wrapping the thing up" (Tr. 1100; JA 139).

These last statements, coupled with Mr. Waldroup's earlier testimony that he would find a malpractice occurred on the basis of secret evidence,⁵⁶ prove that the conference hearing procedure is unfair fundamentally, superficially, right side up and inside out. A hearing at which the basis of charges is laid bare and all evidence is disclosed is required by *Silver*. No such hearing is provided in Neutral Body Systems 1, 2 or 3 — all of which merit disapproval.

C. Criteria for Fines.

Neutral Body Systems 1 and 2 contain no mention of circumstances to be considered by the Neutral Body in assessing a fine, other than the maxima set forth depending on whether it was a first or later offense. Neutral Body System #3 says the "Neutral Body shall consider such mitigating circumstances as it may deem relevant." States Marine set forth specific criteria, reprinted in the footnote below (Ex. 5, pp. 8-9; JA 226).⁵⁷

⁵⁶ Supra, p. 52.

⁵⁷ "(m) Criteria for Fines. The Neutral Body, and arbitrators reviewing its decisions, shall impose (or decline to impose) fines with due regard to the nature and gravity of the violation involved, taking account particularly of the following considerations:

- (1) Whether the violation was innocently or purposefully committed.
- (2) The number of previous violations of the same or related type by the accused line.
- (3) The financial importance of the violation to the accused line and to its shipper, consignee, competitor, or other affected interest.
- (4) Whether the violation substantially offended the spirit of the conference agreement or was merely technical.
- (5) Whether the violation of the conference agreement also constituted a violation of law.
- (6) The fines or penalties customarily imposed by courts for offenses of comparable type and importance.
- (7) Whether a fine or penalty has been imposed on or paid by the accused line for the same violation in a criminal or civil proceeding."

The Commission refused to require that criteria be set forth, finding no basis for anticipating that the "Neutral Body will not exercise fundamental fairness . . ." (JA 409).

States Marine had offered such evidence as follows:

1. In 1959, States Marine was assessed a maximum fine for a first offense — \$10,000 — by Lowe, Bingham & Thomson ("LBT", the TPFCJ's first neutral body) after it had refused access to its records on the ground LBT was secretly employed by States Marine's competitors in violation of the conference agreements on neutrality (Tr. 42-43, 45-46, 47, 50, 58-59; JA 42-45).

2. In 1960, States Marine was assessed a maximum fine for a second offense — \$15,000 — by LBT, again for refusal of access on the same ground, and on the additional ground that LBT's authority to act as neutral body was the subject of a complaint before the Federal Maritime Commission (Docket 920) and that States Marine and the conference had entered into a stipulation providing that the conference would not attempt to collect the first fine until Docket 920 was decided (Tr. 59-60; JA 45-46).

3. In 1961, States Marine's wholly owned subsidiary, Isthmian Lines, Inc., was assessed a maximum fine for a first offense by LBT, again for refusal of access to its records on the grounds set forth above (Tr. 60-61; JA 46-47).

All three fines were subsequently invalidated by the Commission's decision in Docket 920, and by the Court of Appeals' decision⁵⁸ sustaining the Commission's decision, which held that LBT's appointment violated the neutrality requirements of the conference agreement, and conference authorization of LBT's actions as neutral body violated §15 of the Shipping Act. All these invalid fines were for the maximum amount.

⁵⁸ Trans-Pacific Freight Conference of Japan v. Federal Maritime Board, 314 F.2d 928 (C.A. 9, 1963).

The Commission says that although the fines were later invalidated because the neutral body was secretly employed by a conference line, "we cannot say the maximum penalty is unwarranted for a refusal to allow the Neutral Body access . . ." (JA 409). Perhaps not — the first time. But when access was demanded the second and third times on the same line by the same neutral body at a time when that line had challenged in pending litigation that neutral body's authority to act, assessment of successive maximum fines was nothing short of an *in terrorem* device to threaten that line with extinction if it lost the lawsuit. Surely such a history provides ample justification for "anticipating that the Neutral Body will not exercise fundamental fairness" and for specifying criteria to be used in assessing fines.

States Marine offered still more evidence:

4. The Pacific Westbound Conference employs the same neutral body as the TPFCJ and JAGFC — Arthur Young. In the Pacific Westbound Conference, States Marine was fined by the neutral body \$2,500 for failure to obtain sworn notarization of cargo measurements supplied by a shipper. The measurements turned out to be understated, resulting in a \$93 undercharge. In addition, States Marine was assessed \$5,582 for the expenses and fee of the neutral body — a total of \$8,082 for a purely technical infraction (Tr. 160; JA 53).

The Commission says (JA 409): "We do not find the instances of other fines by other Neutral Bodies in other conferences persuasive here." Why? If all neutral bodies in all conferences are shown to assess oppressive fines, what better evidence could there be to show the need to specify criteria for the fining process? Moreover, the instance cited above did not involve "other Neutral Bodies" — it involved this neutral body, Arthur Young.

States Marine offered still another example, one unmentioned by the Commission. That example was furnished by a conference witness, Mr. McCone, the traffic manager for Pacific Far East Line, who testified

that PFEL was fined by Arthur Young \$10,000 for a "very technical matter" — "not a witting malpractice" — for which a fine half as large (!) "would have had just as salutary an effect" (Tr. 435; JA 72).⁵⁹

Thus the record showed the need for the States Marine criteria, and the Commission erred in failing to find (1) that the amounts assessed by neutral bodies in the past have been disproportionately severe in relation to the "crime" committed⁶⁰ and therefore detrimental to the commerce of the United States and contrary to the public interest; and (2) that the criteria suggested by States Marine were in the public interest.

D. The Right to Appeal.

All of the neutral body systems adopted by the conferences explicitly prohibit any appeal from the neutral body's decision;⁶¹ the States Marine proposal provided for an appeal to a three-member arbitration panel (Ex. 5, p. 7; JA 224-25). The Commission held an arbitration provision "unnecessary," citing two cases which held that appellate review is not essential to due process of law (JA 411-12). We agree; it is not; what then?

If appeal is to be denied because it is not required by due process, then the clear implication is that it would be granted if it were required by due process. Yet the Commission rejected each and every admitted

⁵⁹ Not only does the record show that the Neutral Body fines have been completely out of proportion to the offenses, but witnesses for the conference agreed on the stand that at least some of the criteria put forth by States Marine should be utilized by the neutral body. Mr. McCone and Mr. Waldroup agreed that States Marine criteria Nos. 1, 2, 3 and 4 were relevant and should be taken into consideration (Tr. 561-63; 1127-28; JA 79-81; 144-45); and Mr. McCone rejected No. 7 (Tr. 566-67; JA 82-83), whereas Mr. Waldroup might take it into consideration (Tr. 1125-27; JA 143-44).

⁶⁰ Such fines were judicially condemned in *Weems v. United States*, 217 U.S. 349 (1910).

⁶¹ System #1: "All lines agree to accept the decision(s) and assessment(s) of fines thereof by the Neutral Body as final and binding." (Ex. 21, JA 243). Systems #2 and #3: "The members agree to accept the decisions of the Neutral Body as valid, conclusive and unimpeachable . . ." (Ex. 1, JA 217; Ex. 82, JA 288).

"due process" right which States Marine requested on the ground that due process is not required for industry self-policing. If due process is irrelevant, as the Commission maintains, then surely it is also irrelevant whether the right of appeal is or is not required by due process. The inescapable conclusion from the Commission's decision is that there is no rationale behind it; that the Commission chose any reason or no reason to reject each and every one of States Marine's proposals for providing some checks and balances in the neutral body system; and that, to the Commission, a States Marine proposal could be rejected because either it (a) was or (b) was not required by due process.

The Commission also draws some conclusions, unsupported by the record and not self-evident, to show that appeal "would render the self-policing system ineffective" (JA 412). It says (JA 412) appeal would cause delays: we agree — why does that make the system ineffective? It says (JA 412) the Neutral Body "is better qualified to decide than a panel of arbitrators." Why? The neutral body may be selected from any "person, firm, or organization" (Ex. 1; JA 211); so, we assume, may the arbitrators: how can it be positively stated that one unknown person, firm, or organization is better qualified than another? The Commission says arbitration would compel disclosure of the complainant (JA 412). It should, if the arbitrators are to review the evidence. What of it? Disclosure should be required, anyway. Finally, the Commission says "some of the candidates for the Neutral Body position indicated they would not serve if their decisions were to be subject to appeal" (JA 412). Who? The only witness to whom the Commission could conceivably be referring, Mr. Waldroup, is not a candidate, he is an incumbent, and he testified that whether or not an appeal to arbitration should lie is "basically . . . a decision of the conference" (Tr. 1022; JA 120).⁶²

⁶² Except for his reservations concerning arbitration based on his "acquaintance with the nature of the Japanese people," if the Commission were to require disclosure of confidential information, Mr. Waldroup would not object to having the neutral body decisions appealed to arbitration (Tr. 1118, 1120; JA 141-42).

None of the Commission's excuses — legal or "factual" — is adequate; the necessity of an appeal is proved both by the record, and by the governing precedent, *Silver*.

That some check on the neutral body is necessary and desirable is amply proved by the history of States Marine's conflict with these conferences' first neutral body, LBT. The salient facts are set forth supra, pp.57-58; to summarize: LBT fined States Marine⁶³ three times, each time in the maximum amount, for "refusal of access," even though the Commission and Court of Appeals determined that LBT never was entitled to access. Certainly these are, in the words of Mr. Carpenter "run-away decisions by a neutral body" (Tr. 204; JA 56). The Court of Appeals, in sustaining the Commission's decision, said that "a few repetitions of this finding process could easily put it [States Marine] in the hands of a receiver." *Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission*, 314 F.2d 928, 934 (C.A. 9, 1963). A line should be entitled to *some* review before submitting itself to a system in which virtually one man can put it into bankruptcy. Failure to provide such a review is detrimental to commerce, and contrary to the public interest.

The Supreme Court, in *Silver*, explicitly stated that some form of review of industry self-policing is essential; one of the reasons that the Court held an anti-trust suit lay was to provide a forum for review:

"Some form of review of exchange self-policing, whether by administrative agency or by the court, is therefore not at all incompatible with the fulfillment of the aims of the Securities Exchange Act. Only this year, S.E.C. Chairman Cary observed that 'some government oversight is warranted, indeed necessary, to insure that action in the name of self-regulation is neither discriminatory nor capricious.' Cary, *Self-Regulation in the Securities Industry*, 49 A.B.A.J. 244, 246 (1963). Since the anti-trust laws serve, among other things, to protect competitive freedom, i.e., the freedom of individual business

⁶³ Including its wholly-owned subsidiary, Isthmian Lines, Inc.

units to compete unhindered by the group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable." (373 U.S. at 359-60).

Once the Commission approves a neutral body system, however, there can be no review of conference self-regulation by way of an anti-trust action.⁶⁴ The *only* means of insuring "that action in the name of self-regulation is neither discriminatory nor capricious" (373 U.S. at 359) is by providing an appeal to arbitration from the neutral body's decisions. The necessity for some review was set forth in *Silver* and is confirmed by States Marine's experience with neutral bodies. The Commission's failure to discuss and follow *Silver* with respect to the necessity for review was error.

CONCLUSION

The Commission order approving Agreements 3103-17, 3103-26, 150-21, and 150-29 should be set aside.

Respectfully submitted,

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⁶⁴ United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932); Far East Conference v. United States, 342 U.S. 570 (1952).

APPENDIX A

Section 15, Shipping Act, 1916, 46 U.S.C. 814

Sec. 15. That every common carrier by water, or other person subject to this act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or co-operative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different

trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariffs rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than \$1,000 for each day such violation continues, to be recovered by the United States in a civil action:

Provided, however, That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

REPLY BRIEF OF PETITIONERS
STATES MARINE LINES, INC., ET AL.
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 20,134

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STATES MARINE LINES, INC.,
GLOBAL BULK TRANSPORT CORPORATION,

Petitioners,

v.

FEDERAL MARITIME COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

Petition to Review an Order of
The Federal Maritime Commission

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October 25, 1966

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**Petition to Review an Order of
The Federal Maritime Commission**

PETITIONERS' REPLY BRIEF

**REPLY TO RESPONDENT
FEDERAL MARITIME COMMISSION**

On Pages 15-21,* the Commission defends the proposition that it can approve an agreement which is not unanimously adopted by the conference members. The Commission agrees that, under the statute, only

* All citations to pages in respondents' and intervenors' briefs refer to the typewritten briefs.

agreements to which a carrier is a party or conforms are approvable — and then states that States Marine is a party to and does conform to the amendments. Obviously, this is a legal conclusion: on the facts, States Marine's opposition is incontrovertible. States Marine fought these amendments within the conferences, in two Commission proceedings (one involving protracted hearings), and has filed two appellate petitions to review and briefs in support thereof (C.A. No. 18,227; C.A. No. 20,134). The argument that States Marine "conforms" to the agreements because the conference agreement provides for non-unanimous adoption is tautological. The question is precisely whether the non-unanimous provision is lawful under the statute: that question cannot be answered by saying that once there *is* a non-unanimous adoption rule, all parties conform to all non-unanimously adopted agreements.

With respect to the lack of evidentiary findings on unanimity, the Commission says that even if the evidence showed what States Marine said it showed, it does not support "one of the four possible findings enumerated in Section 15 as grounds for disapproval . . ." (Comm'n br., p. 18). The Commission is wrong. As this evidence is summarized in the Commission's brief (p. 18), it compels the conclusion that a unanimity rule results in harmony and cohesion, and a non-unanimity rule results in discord, uncertainty, and litigation.¹ The commerce of the United States

¹ In opposing the Department of Justice's request for an extension of time to file its brief, the intervenor conferences told this Court:

"Delay in this already protracted litigation is becoming increasingly more harmful, as the pendency of this appeal is casting an increasingly darker cloud over the functioning of the neutral body agreement — undermining the member lines' attempt to eradicate the unfair, monopolistic trade practices in the Japan/U.S. trade."

The conference thus pleads that delay and litigation harm its self-policing capabilities; such delay and litigation could be obviated — as it has been in most other conferences — by a unanimity rule.

and the public interest are promoted by the former and harmed by the latter.²

On pages 21-25, the Commission argues that Neutral Body System #3 was properly approved in this proceeding. The Commission says (p. 23) that formal notice by Commission order was unnecessary, because it was understood that alternative neutral body proposals would be considered throughout the hearing—*e.g.*, States Marine's proposal. The point is, however, that there was not only no *formal* notice of Neutral Body System #3: there was no *actual* notice. It was offered in evidence, *and excluded therefrom*, months after virtually all witnesses had testified.³ By contrast, States Marine's proposal (Ex. 5; JA) was prepared following the request of conference counsel at the pre-hearing conference, and was circulated prior to hearing. The conferences were then supposed to come forward with alternative proposals; instead, the conferences stated they wanted the Commission to approve Neutral Body System #2.⁴ Hearings were then held on Neutral Body System #2, and evidence was also adduced on States Marine's proposal (Ex. 5; JA 221-26) — not on Neutral Body System #3, because it was not mentioned until the hearings were all but concluded.

The Commission does not even purport to answer petitioners' argument that under §15 of the Act, the Commission could not approve Neutral Body System #3 as a modification of the agreements set for hearing — Neutral Body System #2 — without finding that Neutral System #2 was discriminatory, detrimental to commerce, contrary to the public interest, or in

² The Commission says, p. 18 fn. 7, that States Marine put in quotation marks words and phrases, citing the Commission's first report — (viz: that the non-unanimous rule is "important" or "necessary" in order to "reconcile a number of divergent interests" and to operate "with as little friction and obstruction as possible") — and that this language does not appear in either Commission report. Before the Commission accuses a party of quoting non-existent language, it should read carefully (1) the cited source of the language and (2) its own brief. The language which the Commission claims does not appear in either Commission report is cited by the Commission itself on page 20 of its brief, and the source given is the Commission's first report.

³ See Petitioners' Opening Brief, pp. 26-27.

⁴ See Petitioners' Opening Brief, pp. 5-6.

violation of the Act. No such finding was made, and the purported modification, adopting agreements outside the record, was invalid.

The remainder of the Commission's brief, pp. 25-42, consists of a defense of each provision of the conferences' neutral body system. The defense generally follows the same pattern: States Marine's objection is stated; the conference provision is set forth; the Commission's report approving the conference formulation is cited; and there the discussion usually ends. There is little reference to the evidence of record, and legal precedents are scarce. States Marine did not contend that the Commission failed to make findings on the critical issues: it argued that the findings made were unsupported by the evidence and contrary to law. These objections are largely unanswered in the Commission's brief.

For example, on pages 33-37 of its opening brief, States Marine showed how each of the seven fact findings of the Commission on the neutrality issue were contradicted by the record. The Commission's discussion of this issue (pp. 25-29) defends not one of these findings of fact. On pages 37-40 of its opening brief, States Marine cited several precedents supporting its position on the neutrality issue. The Commission again discusses none of these, but merely says (p. 29) it does not agree that the "careful protections of the judicial process should be applicable here." Neither precedent nor evidence in support of that disagreement is cited.

Pages 30-43 of the Commission's brief are devoted to sustaining the Commission's decision that the conferences' neutral body systems comport with *Silver* and are fundamentally fair. These propositions were discussed at length in petitioners' opening brief (pp. 40-62), and will not be restated here. We will, however, deal with a few particular statements in the Commission's brief which we believe are misleading or inaccurate.

On page 34, the Commission says that the notice provisions, Article 25(f)(3), directs the Neutral Body "to disclose enough of the substance of the evidence to enable an accused to prepare a defense to the Neutral

Body's charges." Again, on page 38, the Commission says that petitioners' attack on the hearing provisions is based on on its "misconception that the conference amendments provide that an accused will not be informed of the evidence against him." This is not a misconception: this is the fact. Article 25(f)(3), in Neutral Body System #2, directed the Neutral Body to:

"...inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose." (JA 215).

Article 25(f)(3), in Neutral Body System #3 provides:

"...the respondent will be informed at this time of the nature of the alleged breach, and the evidence concerning it which the Neutral Body in its absolute discretion is able to disclose. In so advising the respondent, the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information. In all cases, however, the Neutral Body will inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fair play." (JA 286).

Article 25(e) provides:

"Confidential Information:

(1) The Neutral Body will under no circumstances disclose the name of the complainant to the respondent or anyone else, including the Neutral Body's agents, unless specifically authorized to do so by the complainant." (JA 214; 285).

Thus there is absolutely no guarantee (in fact in some cases there is a prohibition) that critical, scale-tipping evidence will be disclosed which the accused must meet in order to prevail. The Commission's brief relies on the Report which states that if such evidence is not disclosed

"the elements of fundamental fairness are missing." (p. 34). Again, the brief says (p. 38) that the *Commission* "guaranteed an accused this...fundamental fairness." What the Commission *said* was that if he doesn't know such evidence, the elements of fundamental fairness are missing. The Commission then reasoned utterly backwards: (1) such elements are not missing; (2) therefore the accused *does* know the evidence against him. In other words, the Commission said that notice is given because otherwise the agreements would be unfair. It started with the conclusion that the agreements are fair, and therefore reasoned that notice of the derogatory evidence is given the accused.⁵ Since the facts are clearly contrary, the inescapable conclusion, on the Commission's own reasoning, is that the agreements are unfair.

On page 35 of its brief, the Commission states that "no *actual* evidence will be revealed to an accused if such evidence will reveal the identity of the complainant."^{13/} Footnote 13 then says: "It should be kept in mind, however, that an accused will be furnished a summary of any evidence withheld." Where do the neutral body agreements so provide? Nowhere. The "summary" makes its first appearance here.⁶

The Commission, on pages 37-38 of its brief, says that an accused's own auditors should not aid the neutral body by investigating the financial accounts because this would place such auditors in a "potentially embarrassing and disloyal situation which most auditors would prefer to avoid." The fact is that such a system is in operation in several conference agreements

⁵ This inconsistency in the Commission's reasoning is discussed on pages 54-55 of Petitioners' Opening Brief.

⁶ Moreover, even if such a summary were required, it is plainly insufficient. The reliability of the information cannot be tested one whit by the accused if he knows only the contents, but not the source of the evidence. For example, if the information is a letter, or any notation on company letterhead, how prove that the letter is a forgery — or written by a discharged employee? If it is it is a bill of lading, how prove it is on a stolen or made-up form? If the information is verbal, how test the motivations, interest, or animus of the informer?

(Tr. 153; JA) and does not appear to have embarrassed anybody. In rendering a report to the neutral body, the lines' own auditors are not sitting in judgment on their clients, nor levying any fines. They are merely reporting facts as set forth in account books. It is the judgment function, not the reporting of accounts, which creates the conflicts.

In discussing the right to appeal, the Commission stresses its ability to review neutral body action (p. 42, and fn. 20). Such review is possible *only* where the neutral body acts outside the scope of its approved agreements. Thus in Docket 920, States Marine obtained review and ultimate vindication only because the neutral body acted outside its Commission-approved authority.⁷ Like the Securities & Exchange Commission, the Federal Maritime Commission has no power to review particular exercises of self-regulation within the scope of the approved agreements. Thus, for example, since the approved agreements confer "absolute discretion" upon the neutral body with respect to disclosure of evidence, there is no §15 violation, and consequently no Commission review, if critical evidence is not disclosed.⁸ Commission review is no check on neutral body activities where, as here, the neutral body has Commission authorization to be secretly retained by a complainant and assess fines on the basis of undisclosed, untested evidence never revealed to the accused.

REPLY TO RESPONDENT UNITED STATES OF AMERICA

The Department of Justice filed a separate brief for the United States of America, agreeing with States Marine that the conferences'

⁷ The conferences continually stress that the first neutral body was judicially disqualified, Trans-Pacific Freight Conference of Japan v. FMC, 314 F.2d 928 (C. A. 9, 1963), not because it was found to be non-neutral, but only because the approved §15 agreements defined neutrality in terms which it did not satisfy. See Intervenors' Brief, pp. 5-6.

⁸ Moreover, even if the Commission had some sort of surveillance power to assure that the elements of "fundamental fairness" were respected by the neutral body, the accused would not know that the fine was assessed on the basis of undisclosed evidence, precisely because it was undisclosed. How then complain to the Commission?

neutral body system is fundamentally unfair. The United States attacks the three most pernicious provisions in the proposed system: (1) allowing a client-auditor relationship with a member line who may be a secret complainant; (2) use of secret evidence in determining guilt or innocence; and (3) prohibition of any appeal from the neutral body's decisions. The United States suggests that these defects could be cured by requiring the system to permit an accused to appeal to a board of arbiters, free of affiliations, which would conduct a *de novo* hearing, reaching its decision only on evidence disclosed to the accused.

We concur in the United States' position that such an appeal is necessary if the system is to have any vestige of fairness. Indeed, a provision for *de novo* review by an impartial arbitration panel at which all evidence is disclosed, satisfies many if not most of the objections lodged by States Marine against the system, subject to the exception hereafter noted. We do not agree, however, that the neutral body, which renders judgment in the first instance, should be permitted to have a client-auditor affiliation with a secret complainant, or should reach its decision on the basis of undisclosed evidence.

The United States agrees that it would "be preferable for the neutral body to be absolutely free from any possible taint of bias even in a system which provides for a panel of arbiters", but accepts the Commission finding that such an auditor "may not always be available" (p.9, fn.²). This finding is not supported by the evidence on the record as a whole; the present neutral body Arthur Young is unaffiliated (Tr. 1031; JA 120), and so was its predecessor Arthur Andersen (Tr. 428, 444; JA 69, 75).⁹ If the neutral body is to be allowed affiliations, and to receive information which it keeps secret

⁹ Arthur Andersen's predecessor was Lowe Bingham & Thomsons (LBT), which was the first neutral body, and the neutral body involved in Docket 920. In defending LBT's affiliations with a conference line, which were proscribed by the then effective neutral body agreements, the conferences argued that no unaffiliated auditors were available. Nevertheless, two unaffiliated successors were subsequently found.

from the accused, then it should cease entirely any judicial functions, and should act only as an investigator-prosecutor in proceedings before an arbitration panel.

REPLY TO INTERVENOR CONFERENCES

There are numerous allegations and innuendoes in intervenors' statement of facts which States Marine believes are contrary to the facts of record. Again, rather than quibble with each such statement, we rely on our opening brief and the citations to the record therein. In this reply, we point out some of the major flaws in the conferences' arguments.

The first point in the conferences' brief — States Marine's standing to secure judicial review (pp.25-30)—comes somewhat late in the day. The conferences would have this Court believe that States Marine could be the moving litigant for over four years — in two proceedings before the Commission, and twice before this Court — and then be denied judicial review of a totally adverse decision for lack of standing. If States Marine does not have standing for review, then no one does, and the order becomes non-reviewable. Yet this is clearly an order of the Federal Maritime Commission which is reviewable under the Hobbs Act, 5 U.S.C. 1031.

The conferences argue that there is no need for review in that unfair treatment of States Marine is "pure speculation"; should such treatment materialize, States Marine can then secure review. The claim of "pure speculation" is in conflict with the facts. The record shows that States Marine has been subjected to at least \$43,000 in fines arising out of neutral body systems.¹⁰ No one would categorize those fines as speculative. The effects of those fines on States Marine was made clear by the Ninth Circuit:

¹⁰ Of this amount, \$35,000 consisted of the fines illegally imposed by the first neutral body, set aside because of §15 violations in Trans-Pacific Freight Conf. of Japan v. F.M.C., 314 F.2d 928 (1963).

"...a few repetitions of this fining process could easily put [States Marine] in the hands of a receiver." (314 F.2d at 934)

The argument that review should be denied now but will be available at some future time is similarly without merit. Once approved under Section 15, the agreements gain immunity from antitrust statutes. Thereafter, any action of the neutral body, if within the approved agreements, is not subject to attack. The agreements expressly so provide, and even if they did not, there is no Shipping Act violation, hence no cause for complaint to the Commission, if the neutral body operates within the scope of the agreements. Of what significance is it that, in some future fine, States Marine can say that the Neutral Body was the auditor for the complainant when such a relationship has been sanctioned by the Maritime Commission? Moreover, because of the various secrecy provisions, States Marine would never *know* of the complainant-auditor relationship, so could not complain even if it had a cause of action. Obviously, the time and place to test the legality of such relationships is on review of the Maritime Commission decision approving them.

The conferences state that to have standing to seek review, a party must be "aggrieved". This is indeed the wording of the statute.¹¹ The conferences say that "aggrieved" means "adversely affected".¹² But this "definition" is more question-begging than elucidative. A review of decisions indicates that standing for review as an aggrieved person is not interpreted as narrowly as the conferences imply.

For example, the Federal Communications Act provides for review by an applicant for a license or "by any other person who is aggrieved or whose interests are adversely affected by any order of the Commission . . ."¹³

¹¹ 5 U.S.C. §1034.

¹² Government of Guam v. Federal Maritime Commission, 329 F.2d 251 (C.A.D.C., 1964). (Intervenors' Brief, pp. 25-26).

¹³ §402(b)(6), 47 U.S.C. §402(b)(6).

In *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 472 (1940), the Supreme Court held that standing to review was proper based merely on a *threat* of economic injury. Since there is no question that States Marine is "likely to be financially injured"¹⁴ — the test in *Sanders* — it is clear that States Marine is "aggrieved" and thus "adversely affected".¹⁵

The Supreme Court decision in *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) is also in conflict with intervenors' argument that States Marine's petition for review is speculative. There the Court found "enough" to aggrieve the party if contractual rights and business relations are adversely affected:

"Again in *Columbia Broadcasting System v. United States*, . . . this Court considered the problem of standing to review Commission action . . . CBS there sought review of the adoption of Chain Broadcasting Regulations by the Commission. Against the contention that the adoption of regulations did not commend CBS to do or refrain from doing anything, dissent 316 U.S. 429, 62 S. Ct. 1206, this Court held that the order promulgating regulations was reviewable because it presently affected existing contractual relationships. (351 U.S. at 198-99).

Precedents under the Shipping Act on the subject of "standing" are scarce, because once the order is reviewable, there is usually little dispute about whether the petitioner is "aggrieved". One Shipping Act case which did discuss standing was *Government of Guam v. F.M.C.*, 329 F.2d 251 (C.A.D.C., 1964). In that case, this Court affirmed the standing of the government of Guam to challenge a Maritime Commission order setting rates between the U.S. and Guam. Guam's "standing" rested on the alleged economic harm which the people of Guam would suffer from the order.

¹⁴ 309 U.S. at 477. Indeed, the past fines have made the "likelihood" a reality.

¹⁵ The *Sanders* doctrine has been consistently followed. E.g., *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4 (1942); *F.C.C. v. N.B.C. (KOA)*, 319 U.S. 239 (1943).

Two other cases in this Court reviewed orders of the F.M.C. approving agreement under §15. *Isbrandtsen v. U.S.*, 211 F.2d 51(C.A.D.C., 1954) *Alcoa Steamship Co. v. F.M.C.*, 321 F.2d 756 (C.A.D.C., 1963). The petitioners in both cases were not parties to the agreement, but their standing to review the orders was not questioned. If non-parties have standing to review orders approving §15 agreements, then certainly parties-in-spite-of-themselves have such standing, where their contractual rights and obligations are directly affected.

On pages 31-38, intervenors argue that the Commission properly approved Neutral Body System #3, although it was excluded from evidence, because (1) it compromised States Marine's objections; and (2) no hearing on the new provisions were necessary. Neither of the asserted grounds withstands analysis. While certain relatively minor concessions were made (*e.g.*, word "probably" deleted; provision for notifying accused of innocence), States Marine's basic objections were not satisfied. Thus, the "new" neutrality qualifications barring financial interests would prohibit a neutral body from owning one share of a steamship line's stock, but would not bar it from serving as that line's auditor — an infinitely more profitable connection. There was no provision requiring disclosure of actual evidence relied upon; nor any provision allowing appeal. These are the points deemed vital by the respondent United States — and by petitioner States Marine. Other points requested by States Marine were accorded some lipservice — but no more. For example, the new system required the neutral body to take into consideration such mitigating circumstances as it deemed relevant "in its absolute discretion." This is no substitute for the specific criteria proved relevant by States Marine on the record.

The conferences argue (p. 37) that the "fair play" injunction in System #3 raises no factual issue since it"...is a commonly used general term..." If this term purports to remedy what States Marine contends

is the fundamental unfairness of the system, then its application and meaning must be tested in a hearing. ¹⁶

On pages 45-48, the conferences argue that agreements may be submitted for approval under §15 which are not subscribed to by all the parties whom they purported to bind. The conferences cite (p.46) some language from *U.S. Atlantic & Gulf/Australia - New Zealand Conference v. Federal Maritime Commission*. 364 F.2d 696 (C.A.D.C., 1966), which said that while §15 does not prohibit a unanimity rule, the question of whether such a rule is approvable depends upon its compatibility with the §15 criteria for approval. We fail to see how this case supports in any way the conferences' position.

First, the case did *not* hold that non-unanimous agreements are approvable under §15: it held that the statute did not *prohibit* unanimity. Thus, the Commission had *rejected* a conference agreement requiring a 3/4 vote on certain rate questions because only 3 members were entitled to vote, and the practical effect of the 3/4 rule was to require unanimity. This the Commission held was unlawful. The Court disagreed, saying a unanimity rule for rate decisions is not prohibited by the statute. We agree.

It is important to note the distinction between the 3/4 "unanimity" rule involved in *U.S. Atlantic* and the unanimity rule involved here. In *U.S. Atlantic*, the "unanimity" rule was for decision on rate matters: such decisions, when made by the conference, are not required to be filed under §15 of the Act. They are actions within the scope of the approved conference agreement, and need never obtain Commission approval. *Empire*

¹⁶ As shown in our opening brief, p. 52, the present neutral body man testified that he would find an accused guilty on the basis of evidence undisclosed to that accused (Tr. 1678-79; JA 132-33). If the "fair play" injunction alters that testimony, more evidence is needed. If not, it is meaningless.

State Highway Transp. Ass'n. v. Federal Maritime Board, 291 F.2d 336 (C.A.D.C., 1961), cert. denied 368 U.S. 931.¹⁷ Only conference actions which do not fall within the scope of an approved agreement — *i.e.*, which are not merely "interstitial" — must be filed for Commission approval. *Isbrandtsen Co. v. United States*, 211 F.2d 51, 56 (C.A.D.C., 1954), cert. denied 347 U.S. 990.

What *U.S. Atlantic* means is that the voting formula for taking action *within the scope* of an agreement may be approved or disapproved accordingly as the evidence shows it to be a proper or improper formula. What *Isbrandtsen* holds is that any agreement not already covered (as "interstitial") by an existing approval must be separately filed and approved. Thus *U.S. Atlantic's* holding is not dispositive of the legal issue as to whether an amendment to a conference agreement which itself requires §15 approval may be automatically disqualified if one of the "parties" thereto does not agree to it.

Lastly, if, *arguendo*, the holding of *U.S. Atlantic* were relevant here, then the conferences' position that the unanimity issue is one of law only, is wrong. *U.S. Atlantic* restates the necessity for findings with respect to the §15 statutory criteria. States Marine's opening brief, pp. 22-26, showed how the evidence proved that the unanimity rule was detrimental to commerce and the public interest. Such evidence was uncontradicted; the conferences' position was that it was irrelevant.¹⁸ Thus if the validity under §15 of a unanimity rule depends on the four §15 statutory criteria, a less-than-unanimous rule has been proved unlawful in this case.

¹⁷ While, as shown in our opening brief, 83% of all conferences require unanimous vote for amendments to the basic agreement, a majority of conference agreements provide for a less-than-unanimous vote on actions within the conference agreement, characteristically rate actions (Ex. 93; JA 308-26).

¹⁸ See statement of conference counsel (Tr. 1516; JA 175), set forth in States Marine's opening brief, p. 23.

Two very recent Commission decisions have held that the Commission is without power to approve agreements under §15 which are not agreed to by all parties on whose "behalf" they are submitted. In *Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement*, Docket No. 66-29, served September 19, 1966, the question was whether, where the Commission had conditionally approved an agreement subject to modifications, and one carrier had failed to accept those modifications, the Commission could approve the agreement as modified over that carrier's dissent. The Commission held that it could not, in these words (Mimeo opinion, pp. 8-9):

"In order for the Commission to have jurisdiction, there are three necessary elements. There must be:

1. *An agreement* among
2. common carriers by water or other persons subject to the Act
3. to engage in anticompetitive or cooperative activity of the types specified in section 15.

If one or more of these elements is lacking, we have no jurisdiction to consider the matter under section 15."

* * *

". . . Finally, and most fundamental of all is the requirement that there be an actual, viable agreement to which all of the parties have given and continue to give their assent until approval is had.

The purported Agreement No. 9431 in this case fails to meet this latter criterion.

When a group of carriers files a new agreement with the Commission, it is fundamental that each member of this group must give its individual assent to the document purporting to represent the agreement of the parties. If at any time prior to approval by the Commission, one of the parties to the agreement changes its mind and withdraws from the agreement, the document previously filed becomes at the moment obsolete. It no longer constitutes a fair and accurate description of the agreement between the parties.

Accordingly, where as here, one of the parties to the agreement withdraws from the agreement as filed, that act destroys the subject matter of the Commission's jurisdiction.

We can only consider *agreements* for approval under section 15. What we have before us is manifestly a non-agreement."

In the Matter of the Petition of New York Freight Bureau (Hong Kong) For a Declaratory Order, Docket 66-32,¹⁹ served October 4, 1966, a related case to Docket 66-29, raised the question of whether an amendment to a conference agreement was approvable under §15 where a line (States Marine) had sent a telegram to the Commission stating that it withdrew from the agreement prior to Commission approval. The Commission, relying on its decision in Docket 66-29, held that its previous order approving the agreement in part "was void *ad initio* since said agreement was not properly before the Commission for approval." (Mimeo opinion, p. 6).

We concede that the basic conference agreements involved in these two cases, like most conference agreements, require unanimous adoption of changes to the basic agreement. Yet the Commission held, in clear language, that it had jurisdiction under §15 to consider only agreements, not non-agreements. Under the reasoning of these decisions, to qualify for §15 approval²⁰ an agreement can not be a non-agreement. It follows that unanimity is required for amendments to basic conference agreements. The Commission's contrary conclusion in this case is irreconcilable with its decisions in Dockets 66-29 and 66-32.

On pages 49-53, the conferences argue that judicial concepts of neutrality do not apply because governmental action is not involved: the conference self-policing systems are voluntary. The answer to this

¹⁹ Mistitled in the Commission's order as Docket 66-52.

²⁰ This of course excludes rate agreements which fall within the scope of basic conference agreements and need not so qualify. See *supra*, pp. 13-14.

argument is contained in intervenors' own brief (p. 40): "...the 1961 amendments. . . insert[ed] the requirement of disapproval on a finding of inadequate policing. . . ." As the Department of Justice said (Brief, p. 4): "There is no question that Congress sought to have self-policing systems which are effective." Thus the self-policing system is Congressionally, not self-imposed. As for the *Avery* and *Mayfield* cases cited by the conferences (p. 52), we respectfully refer the Court to States Marine's discussion of those cases in its Reply Brief of May 24, 1965 to the Examiner, pp. 1, 12-13 (JA 332, 333-35).

The remainder of intervenors' brief, pp. 54-70, argues that the neutral body system is fundamentally fair. Since this issue has been discussed at considerable length in our opening brief, we will refrain from refuting again intervenors' arguments. We can not, however, refrain from pointing out one clear misstatement of fact. Intervenors state, p. 60 that:

"Under the approved Article 25(f)(3), the neutral body must disclose all the actual evidence at its disposal unless to do so would jeopardize the confidentiality of its sources of information. If it must withhold the actual evidence for this reason, the neutral body is adjured to consider only the evidence made available at the hearing in making its determination."

This is definitely not the fact. There is no direction, under Article 25(f)(3) - or any other Article - of either neutral body system #2 or #3 to "consider only the evidence made available at the hearing in making its determination." For convenient reference, the complete text of both versions of Article 25(f)(3) is set forth in Appendix A to this brief.

CONCLUSION

The Commission order approving Agreements 3103-17, 3103-26, 150-21, and 150-29 should be set aside.

Respectfully submitted, †

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October 25, 1966

APPENDIX A

Article 25(f)(3) of Neutral Body System #2 provides:

"After the Neutral Body has completed its investigation and arrived at its tentative decision that there was a breach (but before announcing the breach to the Ethics Committee, and even before the amount of damages is decided), the Neutral Body will inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose. Within fifteen (15) days, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or counsel, and offer to the Neutral Body such explanation as it may choose at such meeting."

Article 25(f)(3) of Neutral Body System #3 provides:

"After the Neutral Body has completed its investigation, it shall advise the respondent either that a breach has not been found or that there are reasonable grounds to believe that a breach occurred. In the latter event, the respondent will be informed at this time of the nature of the alleged breach, and the evidence concerning it which the Neutral Body in its absolute discretion is able to disclose. In so advising the respondent, the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information. In all cases, however, the Neutral Body will inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fair play. Within fifteen (15) days, or within such reasonable time thereafter as the Neutral Body may in its sole discretion grant, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explanations and/or rebutting evidence as it may deem proper and desirable. At such hearing, the Neutral Body shall consider all of the available evidence and make its decision in accordance with the standards set forth under Article 25(f)(2) hereof."

BRIEF FOR RESPONDENT FEDERAL MARITIME COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20134

STATES MARINE LINES, INC.,
GLOBAL BULK TRANSPORT CORPORATION,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR REVIEW OF ORDER OF
THE FEDERAL MARITIME COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 10 1966

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Federal Maritime Commission

September 19, 1966
Washington, D. C.

QUESTIONS PRESENTED

In Docket No. 1095, Trans-Pacific Freight Conference of Japan and Agreement No. 3103-17 Japan-Atlantic and Gulf Freight Conference (March 25, 1966), the Federal Maritime Commission approved under section 15 of the Shipping Act, 1916 (46 U.S.C. 814) Agreements No. 150-29 and 3103-26 which established self-policing systems for two steamship conferences.

The questions as stipulated by petitioners and respondents and approved by the Court on June 2, 1966, are as follows:

1. Whether the Federal Maritime Commission properly approved Agreements 150-29 and 3103-26?

2. Whether the Federal Maritime Commission may, pursuant to section 15 of the Shipping Act, 1916, approve modifications of conference agreements which are adopted on less than unanimous vote and which bind all conference members, even though one or more conference members opposes the modifications and protests their approval?

3. Whether the Commission properly approved pursuant to section 15 of the Shipping Act, 1916, and in light of Silver v. New York Stock Exchange, 373 U.S. 341 (1963), a so-called "neutral body" agreement which permits a private tribunal to assess liquidated damages for breaches of conference obligations, where the neutral body:

a. is eligible to serve, although having a professional or business relationship with any conference member (including a complainant), except a conference member against which a complaint has been filed, if

such relationship is disclosed before appointment or approved by the conference when it arises, even though after such appointment or approval no conference member may veto the appointment or otherwise prevent the continuation of the appointment of the neutral body;

b. may receive complaints from undisclosed complainants, may reach its decisions on the basis of confidential information, and allows the respondent member line to provide a defense only after it has completed its investigation and arrived at a tentative decision concerning whether there are reasonable grounds to believe that a breach occurred;

c. can impose assessments ranging from ten thousand dollars for a first offense up to thirty thousand dollars per offense for fourth or successive offenses, without limit as to the number of assessments which may be imposed;

d. is not obligated to reveal the identity of a complainant in any case; and

e. makes decisions which are nonreviewable on the merits, although the decisions must conform to the standards of the agreement as approved by the Federal Maritime Commission?

4. Whether the Commission order under review is supported by substantial evidence and the requisite findings of fact and conclusions of law?

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* Cases principally relied upon.

I. COUNTERSTATEMENT OF THE CASE

A. The Parties

Petitioners, States Marine Lines, Inc. and Global Bulk Transport Corporation jointly operate an ocean common carrier service, known as States Marine Lines, in the various trades from Japan to the United States, among others. States Marine is a member of the Transpacific Freight Conference of Japan (Trans-Pacific) which covers the trade from Japan to the Pacific Coast of North America, and the Japan-Atlantic and Gulf Conference which covers the trade from Japan to Atlantic and Gulf ports of the United States. These conferences, interveners here, pursuant to approval granted by the Federal Maritime Commission under section 15 of the Shipping Act, 1916 (46 U.S.C. 814), set the rates, rules, and regulations to be observed by the conference members in these trades. The conference agreements require the members to sell ocean transportation at the rates in the conference tariff and to adhere to the requirements of the conference agreement and the various rules and regulations. In particular, the members are obliged not to grant concessions or rebate part of the freight charges or to indulge in other competitive malpractices.

B. History of the Litigation

After years of rate instability in these trades and because of the prevalence of malpractices, the conferences in 1958 amended their agreements

in an attempt to insure fidelity to the various obligations of conference membership, by establishing a system of conference self-policing. The amendments provided for the employment of a "neutral body", a firm to be chosen from responsible accountants or other persons, for the purpose of investigating complaints of malpractices by member lines, and assessing fines therefor. The self-policing provisions, which are embodied in Article 25 of the agreements, were approved by the Commission on March 12, 1959.

The initial neutral body agreement, Neutral Body No. 1, provided that the firm acting as neutral body could be neither employed by nor financially interested in any conference member.

Both conferences retained the international accounting firm of Lowe, Bingham & Thomsons (Lowe) to serve as the Neutral Body because it possessed the desired qualifications, including international connections, accounting expertise, and professional reputation.

Lowe, in performance of its duties as Neutral Body, sought in 1959 to investigate a complaint against petitioners. The complaint alleged that petitioners had granted free passage from San Francisco to Japan to certain shippers in order to obtain the patronage of these shippers. Lowe representatives visited petitioners' Tokyo office to investigate the complaint. They uncovered evidence of a request for free passage but no indication that the request had in fact been honored. Subsequently, on three occasions, Lowe, through its New York correspondent Price, Waterhouse

and Co. tried to inspect records at petitioners' New York office. Later developments disclosed that Price is also the regular auditor of United States Lines Co., a member of Trans-Pacific and a competitor of petitioners in that trade.

When Price first sought access to petitioners' records, petitioners proposed that its own regular auditors make the investigation under the direction of Price. Price rejected this offer. Thereupon, petitioners refused to allow Price access to the records. In accordance with the terms of the self-policing amendment by which the members agreed to allow the neutral body the right to inspect the members' business records, the Neutral Body levied a fine (\$10,000, maximum fine for first offense) against petitioners for refusing access to company records.

Petitioners then filed a formal complaint with the Commission (Docket No. 920) in which it alleged that Lowe was not qualified to serve under the Neutral Body agreement because of the affiliation of its correspondent Price with United States Lines, a conference member.^{1/}

^{1/} While the proceeding in Docket No. 920 was pending, Price again sought access to petitioners' records. Petitioners refused and were fined an additional \$15,000 (maximum fine for second offense). Petitioners again objected and filed a second complaint with the Commission (Docket No. 920-1).

Price made a third attempt to gain information, this time seeking to investigate the records of Isthmian, a wholly-owned subsidiary of petitioners. Isthmian refused and was fined \$10,000, upon which it filed a complaint with the Commission.

The Commission, in deciding the controversy, found that Lowe's appointment as Neutral Body violated the neutrality requirements of the Neutral Body No. 1 which disqualified any firm with a professional affiliation with a conference member line.^{2/} The fines were ordered cancelled. States Marine Lines, Inc. v. Trans-Pac. Freight Conf., 7 F.M.C. 204 (1962). On appeal by Trans-Pacific, the Ninth Circuit Court of Appeals upheld the Commission. Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n, 314 F.2d 928 (9th Cir. 1963).

Before the Commission issued its decision in States Marine Lines, Inc. v. Trans-Pac. Freight Conf., supra, the conferences filed with the Commission amendments to Neutral Body No. 1. These amendments (150-21 and 3103-17; J.A. 208,220), Neutral Body No. 2, provided in substance that a neutral body must disclose its financial or professional affiliations with any member line, but that disclosure of such an interest would not disqualify the neutral body from serving unless its affiliation was with an accused line, in which event the neutral body would appoint an unaffiliated agent to conduct the investigation.

^{2/} Although Trans-Pacific, subsequent to Lowe's appointment, had deleted certain neutrality requirements, the Commission found such deletion illegal as a "modification" of the agreement which was never approved by the Commission.

Petitioners who had voted against adoption of Neutral Body No. 2 in conference deliberations, protested the approval of these amendments, and the Commission instituted a proceeding (No. 1095) to determine whether the amendments should be approved pursuant to section 15. In this proceeding, the Commission was particularly interested in determining whether the unanimous vote of the conference members was prerequisite to section 15 approval.

On October 30, 1963, the Commission approved Neutral Body No. 2 and determined that section 15 does not require unanimous adoption by the conference members of an amendment to the conference agreement. Trans-Pacific Freight Conf. - Self-Policing System, 7 F.M.C. 653 (1963).

On November 9, 1963, petitioners appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit in States Marine Lines, Inc. v. Federal Maritime Commission, No. 18,227. In its brief, filed with the Court January 23, 1964, States Marine placed heavy reliance on the Supreme Court's decision in Silver v. New York Stock Exchange, 373 U.S. 341 (1963).^{3/} The Commission accordingly filed a Motion to Remand in No. 18,227 stating that it desired "to reopen and reconsider this case in light of Silver and to conduct such further proceedings as it deems appropriate". It further provided "Upon the Court's remand, the

^{3/} Silver was decided after the Commission heard oral argument in Docket No. 1095 and was not cited to nor considered by the Commission.

Commission will vacate the existing Report and Order and . . . afford the parties . . . full opportunity to offer evidence and argument in the reopened proceeding", and urged that "petitioners cannot be prejudiced by a reconsideration of Docket 1095 which takes into account the principal legal precedent they are urging before this Court". The Court granted the Commission's Motion to Remand.

The Commission's order reopening the proceeding placed in issue the approvability of Neutral Body No. 2. By subsequent order, the Commission granted a motion of petitioners to include in the investigation the issue of the validity of Neutral Body No. 1 as it then stood approved. The Commission further expanded the proceeding to include the question of whether unanimous vote of the parties was required for amendments to agreements approved under section 15 notwithstanding that the agreement might provide for amendment by vote of a lesser majority.

Just before the close of the hearings, conference counsel sought to introduce further amendments to the neutral body agreements which were responsive to a number of the objections made by petitioners to Neutral Body No. 2. These amendments, Neutral Body No. 3, adopted by the conferences over the objection of petitioners, had been filed earlier with the Commission and designated Agreement No. 150-29 and Agreement No. 3103-26. Petitioners opposed their inclusion in the proceeding. The Examiner ruled that the new amendments went beyond the scope of the Commission's order of investigation insofar as the question of their approvability was concerned,

but he admitted the amendments into evidence for the purpose of showing petitioners' motivation in protesting approval of the agreements. The conferences, Trans-Pacific and JAG, thereafter moved the Commission to amend its order of investigation to include Neutral Body No. 3. The Commission denied the motion but stated in its order of March 31, 1965:

Of course, there is nothing to preclude counsel for the conference from setting forth in their briefs any proposals for modification of the contested clauses which alleviate the dispute between the parties.

Our decision in Docket 1095 will resolve the issues between States Marine and the conferences as to what the conferences self-policing provisions may and should include and all proposals by counsel for the parties will be considered. (J.A. 328).

The Examiner accordingly considered Neutral Body No. 3 in his initial decision.

The Examiner approved Neutral Body No. 2, as modified by Neutral Body No. 3. States Marine excepted. On March 25, 1966, the Commission upheld the Examiner and approved Neutral Body No. 2 as modified by Neutral Body No. 3. Agreement No. 150-21, Trans-Pacific Freight Conference of Japan and Agreement No. 3103-17, Japan-Atlantic and Gulf Freight Conference, F.M.C. Docket No. 1095 (March 25, 1966). It is this Report which is the subject of this review proceeding.

C. Neutral Body Provisions

1. Neutral Body No. 1 (J.A. 263-65)

The original Neutral Body agreement (No. 1) provided that the "Neutral Body" would receive and investigate complaints of malpractices (Art. 25 (1) and (2)). The Neutral Body was empowered to engage agents to aid in investigation and was "to have absolute discretion to decide whether an infringement has taken place" (Art. 25 (3) and (4)). Fines could be assessed at a maximum of \$10,000 for first offense to \$30,000 for fourth or subsequent offenses (Art. 25 (4)). The decisions and assessments of fines by the Neutral Body were to be final and binding (Art. 25 (7)).

2. Neutral Body No. 2 (J.A. 211-17)

Neutral Body No. 2 established different qualifications for the appointment of a firm to serve as Neutral Body (Art. 25(a)). It established more definite guidelines to be followed by the Neutral Body in respect to investigation, hearing, and decision (Art. 25(d) and (f)). These amendments empowered the Neutral Body in the course of its investigation to inspect, copy, and obtain correspondence, records, and documents from the offices of any member line, and with the members' cooperation, if the materials were deemed by the Neutral Body to be relevant to the complaint (Art. 25(d)). The Neutral Body could not disclose the name of the complainant, unless authorized to do so by the complainant, or other information received during investigations except in reporting breaches found and damages assessed to the conference (Art. 25(e)).

The amendments further provided that the Neutral Body, in reaching its decision, ". . . will not be restricted by legal rules of evidence or the

burden of proof required to establish criminality, or even a civil claim. Instead, it will employ rules of common sense . . ." (Art. 25(f)(2)).

The Neutral Body was required to inform an accused member of the nature of the breach and grant the accused an opportunity to explain the alleged breach (Art. 25(f)(3)^{4/}).

The Neutral Body then made its decision and assessed fines in the manner provided in Neutral Body No. 1 (Art. 25(f)(4)). There was no appeal from the Neutral Body decision (Art. 25(g)).

3. Neutral Body No. 3 (J.A. 283-88)

Neutral Body No. 3 is a further refinement of Neutral Body No. 2.. It prevents a Neutral Body from serving if it has a financial interest in any conference member or its agents, thereby further guaranteeing "neutrality" (Art. 25(a)). It includes a two-year statute of limitations (Art. 25(b)(3)). Neutral Body No. 3 also includes more detailed guidelines to be followed in giving an accused notice of an alleged breach, evidence concerning such breach, and an opportunity to explain or rebut any evidence or allegation. In this respect Art. 25(f)(3) would provide:

4/ (f) Hearing for the Respondent; Neutral Body Decisions and Announcement Thereof:

(3) After the Neutral Body has completed its investigation and arrived at its tentative decision that there was a breach (but before announcing the breach to the Ethics Committee, and even before the amount of damages is decided), the Neutral Body will inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose. Within fifteen (15) days, if the respondent so requests, it may meet with the Neutral Body with or without its own accountant and/or counsel, and offer to the Neutral Body such explanation as it may choose at such meeting. (J.A. 215).

(3) After the Neutral Body has completed its investigation, it shall advise the respondent either that a breach has not been found or that there are reasonable grounds to believe that a breach occurred. In the latter event, the respondent will be informed at this time of the nature of the alleged breach, and the evidence concerning it which the Neutral Body in its absolute discretion is able to disclose. In so advising the respondent, the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information. In all cases, however, the Neutral Body will inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fair play. Within fifteen (15) days, or within such reasonable time thereafter as the Neutral Body may in its sole discretion grant, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explanations and/or rebutting evidence as it may deem proper and desirable. At such hearing, the Neutral Body shall consider all of the available evidence and make its decision in accordance with the standards set forth under Article 25(f)(2) hereof. (J.A. 286).

These amendments provide for notice to an accused of the Neutral Body's decision that a breach has not been found if such is the case (Art. 25(f)(4)). The Neutral Body, according to these amendments, will consider such mitigating circumstances as it may deem relevant in determining the amount of liquidated damages (Art. 25(f)(4)).

In all other respects Neutral Body 3 is identical to Neutral Body No. 2. The Commission approved Neutral Body No. 2 as amended by Neutral Body No. 3.

II. SUMMARY OF ARGUMENT

Every steamship conference, authorized to act under section 15 of the Shipping Act, 1916 (46 U.S.C. 814), must police the obligations under its conference agreement in an adequate manner as a condition to continued approval of the Federal Maritime Commission. In order to meet this responsibility, two conferences submitted for approval a self-policing system under which an expert firm, the Neutral Body, was appointed to investigate alleged breaches of the agreements and to assess fines where warranted.

The Neutral Body amendments, approved by the Commission, specify the qualifications of the Neutral Body and its powers in policing the obligations of the members. The Neutral Body amendments also spell out the rights of a member accused of violating the agreement. The Commission, in approving these amendments, has provided that the firm acting as Neutral Body shall be elected by the membership pursuant to conference voting rules, that it shall reveal any association with any member, and that it shall not be related in any respect to any conference member accused of breaching the conference agreement. The firm that meets these tests shall have freedom to examine the books and records of any member in the course of its self-policing activities.

Under the self-policing arrangement, a member accused of breaching the agreement is given notice of the subject of the alleged breach and the facts, other than those which must be confidential, sufficient to prepare an adequate defense. Thereafter, an accused member is given an opportunity

to present to the Neutral Body whatever facts or arguments it wishes. An accused is not told the identity of the complaining member and the determination of the Neutral Body is final.

In delineating the relationship between an accused member and the Neutral Body, the Commission sought a Neutral Body system which could satisfy the section 15 requirement of adequate policing and yet guarantee to a member accused of breach of the conference agreement, not every Constitutional protection, but rather the protections of fundamental fairness.

The Neutral Body amendments were adopted over the objection of petitioners, conference members, who claim that unanimous endorsement is necessary. However, the conference members did adopt the amendments in accord with the conferences' majority rules which have been approved by the Commission under section 15. A unanimous vote is not required for conference action, nor is it required by the terms of section 15 which speaks, not of unanimous voting, but of broad criteria of disapproval. Petitioners cannot show that the amendments are contrary to these standards. Therefore, conference action, duly entered, to implement a requirement of section 15 to police the obligations of the conference cannot be frustrated by the veto of a single line.

The Examiner and the Commission approved a self-policing system which was presented at the hearing as a compromise. The parties were informed that the terms of this system were to be considered and evidence and argument were presented thereon. The fact that the orders instituting the proceeding

specifically identified only the earlier proposals, did not estop the Commission from considering the later proposal which fell well within the general scope of the proceeding.

The system approved by the Commission provides that the Neutral Body shall be sufficiently disinterested to insure fairness to the conference and an accused member. The present Neutral Body is completely independent. However, the Commission did not require absolute, inviolate neutrality. Rather, the Commission required that the firm disclose any affiliation with a member and disqualify itself if such affiliation is with an accused member line. This obviates any problem of bias of the Neutral Body against an accused member.

Under the Neutral Body amendments, an accused member is advised whether or not the Neutral Body considers that there are reasonable grounds to believe that a breach has occurred. If so, the accused is informed of the nature of the breach and the facts concerning it which can be revealed without disclosing the identity of the complaining member or jeopardizing the confidentiality of the Neutral Body's source of information. The accused is then given an opportunity to present facts and argument. This notice and hearing procedure is fair to an accused member and allows it to show that the preliminary determination of the Neutral Body is in error. The Commission also found it unnecessary to insist that the Neutral Body amendments contain explicit criteria for the assessment of fines. Likewise, the Commission found that the right of appeal would not be required particularly since an accused member could come to the Commission in the event the Neutral Body acted beyond its authority.

The Commission approved the Neutral Body to permit the conferences to police the obligations of the conference agreement in a manner which was both effective and fair. The Commission's report and order should be affirmed.

III. ARGUMENT

A. Section 15 Does Not Require Unanimous Approval For The Adoption of Modifications of a Basic Conference Agreement

Petitioners argue that the modifications to the basic conference agreements are not operative because they were not endorsed by all the parties to the agreement, viz. States Marine. Petitioners' argument runs this way: States Marine voted against the adoption of each of the modifications; it signed none of the agreements; consequently, under the language of section 15 and under principles of the law of contracts, the modifications of the basic agreements are unapprovable. The Commission's decision in effect, says States Marine, permits a group of carriers to force another carrier to collaborate in anticompetitive behavior against its will under an antitrust immunity it does not want.

Articles No. 18 and No. 19 of the basic conference agreements set forth the applicable voting requirements.^{5/} Pursuant to Article No. 18, three-fourths of all parties entitled to vote constitutes a quorum for routine conference business. However, when changes in the basic agreement are being considered, four-fifths of those entitled to vote constitutes a quorum. Article 19(a) provides that in the presence of a quorum (four-fifths),

^{5/} Articles No. 18 and No. 19 were incorporated into the conference agreement before States Marine was admitted to membership. (J.A. 259-60).

all parties agree to be bound by amendments to the basic agreement which are affirmatively adopted by two-thirds of all parties entitled to vote.

There is no question that the various Neutral Body modifications were adopted by the conferences in accordance with these voting rules. Thus, the various neutral body arrangements are not suspect because of any procedural deficiency in their adoption. But were the voting provisions themselves lawful?

No provision in section 15 renders the voting requirements invalid. The majority voting provision was shown only to be unpalatable to petitioners, not to offend section 15 in any respect. Thus, the Commission refused to disapprove the amendments because of majority rule since the majority voting provision was not shown by States Marine to contravene section 15.^{6/}

States Marine contends that a less-than-unanimous amendment offends the language of section 15 which speaks of "every agreement . . . or modification or cancellation thereof, to which . . . [the carrier] may be a party or conform in whole or part . . ." States Marine argues that it is not a party, nor does it conform to the amendments in issue here. The

6/ States Marine must show that the voting requirements are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; operate to the detriment of the commerce of the United States; are contrary to the public interest; or are in violation of the Shipping Act, 1916. Aktiebolaget, Svenska Amerika L. v. Federal Maritime Com'n., U.S. App. D.C. ____; 351 F 2d 756 (1965).

simple answer is that States Marine is a party and does conform to the amendments. Its unilateral renunciation does not obviate the fact that the amendments were regularly ratified by the conference members in accordance with the approved conference voting machinery. As a conference member, States Marine is a party and does conform to legitimate conference action, duly entered, regardless of States Marine's disclaimer.

States Marine argues that the less-than-unanimous vote on amendments forces it to engage in anticompetitive activity that it eschews. This plea for the preservation of competition is misplaced here. In this situation, the conferences, pursuant to approved conference voting machinery, have simply implemented a requirement of the Shipping Act; they have instituted a self-policing system designed to end malpractices in order to preserve their identity as conferences.

States Marine next claims that in the proceedings before the Commission, the conference refused to produce evidence that its present voting rules are indispensable. Of course, the conferences had no need to. It was States Marine, in its role as challenger of approved and operative voting procedures, that had the initial burden of showing that the voting requirements were contrary to section 15. The conferences were not required to justify their longstanding procedures.

States Marine points to evidence it alleges should have persuaded the Commission to rule otherwise. That evidence, according to States Marine, is:

1. That most of the amendments of the conference agreements have been supported unanimously and that those that have not been have caused friction, notably the controversy of which this proceeding is the most recent;

2. that most conferences permit amendments to the organic agreements on unanimous endorsement;

3. that, specifically, the Pacific Westbound Conference and the Far East Conference, composed of most of the carriers who are members of JAG and Trans-Pacific require unanimous approval of amendments to the basic agreement.

Taking these facts at face value, they are not particularly persuasive that the conferences' voting requirements are unlawful. Certainly, as both the Examiner and the Commission found, the facts do not support one of the four possible findings enumerated in section 15 as grounds for disapproval of a conference agreement or modification. Aktiebolaget Svenska Amerika L. v. Federal Maritime Com'n., supra.

States Marine challenges the Commission's "finding" in its first report that the rule is "'important' or 'necessary' in order to 'reconcile a number of divergent interests' and to operate 'with as little friction and obstruction as possible' . . ." (Pet. Br. 26).^{7/} The first report states:

^{7/} This "quotation" does not appear in either Commission report.

We do not consider it unreasonable for a conference to make such a provision in its basic agreement, provided it is not applied so as to contravene the standards of section 15. We find nothing in the concept of majority rule as applied to the proposed modifications here under consideration which renders it discriminatory as between carriers or shippers, detrimental to the commerce of the United States, contrary to the requirements of section 15. (J.A. 18).

In the second report, the Commission further stated:

States Marine has offered nothing which causes us to change our views as expressed above. We would only add that in our view unanimity could well work to increase rather than decrease friction among the members of the conferences. The record here clearly demonstrates that if the respondent conferences each had the unanimity rule, there would be no Neutral Body system presently before us for approval. Therefore, the respondents' attempts to satisfy their statutory obligations to adequately police their obligations under the respective agreements would be frustrated. Such a result would of course be contrary to public interest and detrimental to commerce within the meaning of section 15. (J.A. 415).

Next, States Marine argues that the Commission failed to apply strict contractual rules and complains because the Commission pointed out that if States Marine does not like, for one reason or another, the Neutral Body amendment acceptable to their fellow conference members, its alternative is to resign from conference membership.

In this proceeding, the Commission refused to sacrifice its obligations under section 15 to the technicalities of contract law. As the Commission stated in its first Report:

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In this proceeding, the Commission refused to sacrifice its obligations under section 15 to the technicalities of contract law. As the Commission stated in its first Report:

In attempting to show that the voting requirements are invalid, States Marine attempts to draw analogies from the field of private contract law. We think these analogies improper. Private contracts, normally between two parties, cannot reasonably be equated with agreements approved under section 15. An agreement providing for the organization of a conference to operate in our foreign commerce is of necessity an agreement which attempts to reconcile a number of divergent interests insofar as is consistent with Congressional policy and the public interest in the free flow of our foreign commerce. Such an agreement must provide for the continuing commercial operations of a relatively large number of conference members with as little friction and obstruction as possible. The very heart of such an agreement is that each individual line relinquishes some of its freedom of action, in exchange for the benefits resulting from participation in the conference arrangement. */ (J.A. 17-18)

*/ This is by no means a novel relationship. Analogous situations pervade our political, economic and social structure. Just one example in the economic sphere is found in corporate organizations. A corporation can make fundamental changes in its charter, changing the very nature of the corporate business, and most states require only that the consent of two-thirds or three-fourths of the stockholders be given to this change. The dissenting stockholder must either bow to the will of the majority, or sell his stock. The latter alternative is, in effect, resignation from the corporation. [Footnote the Commission's].

With respect to petitioners' argument that its option to resign from the conferences does not give any actual remedy, we must agree. We admit that this alternative may be ill advised because of the many competitive advantages that attach to conference membership. However, States Marine's reluctance to resign from the conference does not entitle States Marine to take full advantage of conference benefits yet foil legitimate conference action.

The voting procedures of the conferences must stand. They are not violative of the Shipping Act, and the record shows that they do not operate contrary to the provisions of section 15.

The Commission considered the conference's amendments on their substantive merits, not on the claim that a handful of members, for their own reasons, voted against them. The tally of votes is not nearly so important when measured against the proviso of section 15 making self-policing mandatory. The distinction between States Marine's attempt to veto conference action taken in accordance with voting requirements approved by the Commission under section 15 and the merits of the amendments from a public policy standpoint is particularly sharp here. For, section 15 specifically requires that "the Commission shall disapprove any such [conference] agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it". The Neutral Body amendments were filed in an attempt to meet the requirements of this provision. Commission approval of such amendments should not be thwarted by a dissident minority of the conference membership.

B. The Commission Properly Considered and Approved Neutral Body No. 3.

Petitioners maintain that neither the Examiner nor the Commission could approve the amendments embodied in Neutral Body No. 3 (Agreements 150-29, 3103-26, (J.A. 283-88) because they were (a) not noticed for hearing, and (b) excluded from evidence (Pet. Br. 26-31).

The Commission order expanding the issues on rehearing served May 15, 1964, ordered that:

. . . the Commission enter upon an investigation and hearing to determine whether or not Articles 10, 12 and 25 of Agreements 150 and 3103, as they now stand approved by the Commission, and the proposed modification thereof embodied in Agreements 150-21 and 3103-17 respectively . . . should be approved, disapproved or modified pursuant to section 15 of the Act. (J.A. 35).

Petitioners maintain that since this order makes no specific reference to Neutral Body No. 3 and since the Commission refused to amend the order to include specific reference to it, Neutral Body No. 3 was not noticed for hearing and therefore was erroneously considered. The May 15th order however, also recited that:

It appears that the issues in this proceeding can best be resolved by a general inquiry into all pertinent aspects of the neutral body systems of the respondent conferences.

Subsequently, on March 31, 1965, when the Commission refused to amend its order to include specific reference to Agreements 150-29 and 3103-26, Neutral Body No. 3, the Commission stated:

Of course, there is nothing to preclude counsel for the conference from setting forth in their briefs any proposals for modification of the contested clauses which alleviate the dispute between the parties. (J.A. 35)

Our decision in Docket 1095 will resolve the issues between States Marine and the conferences as to what the conferences' self-policing provisions may and should include and all proposals by counsel for the parties will be considered. (J.A. 328).

The above statements indicate that the Commission felt there was no need to amend the order to include specific reference to Neutral Body No. 3; that the previous order was not intended to restrict the Examiner to a consideration of only the provisions enumerated therein; and further that the Examiner was free to consider any proposal or provision which would be offered by any of the parties and which might narrow the area of dispute. Petitioners were certainly aware that all proposals would be considered. This is evidenced by the fact that throughout the proceeding they sought to impress the Examiner and the Commission with proposals of their own which likewise were never noticed for hearing. Had the Examiner or the Commission found petitioners' proposals worthy of acceptance, it is unlikely that petitioners would raise the same objection, although such an objection would be equally applicable.

The Examiner correctly interpreted the Commission's statements "to constitute assurance to respondent conferences that any proposals for modifications of contested provisions which alleviate the disputes between the parties will be considered" (J.A. 338).

For these reasons, the fact that no specific reference was made to the disputed amendments in the order reopening the proceedings does not preclude consideration of those amendments.

Petitioners further allege that because the Examiner allowed the admission of Exs. 82, 83 (J.A. 280, 293) (a statement of Neutral Body No. 3 provisions) for the limited purpose of showing petitioners' motivations in opposing the provisions, it was improper subsequently to approve them.

Petitioners overlook the fact that Neutral Body No. 3 could have been considered and approved even if Exhibits 82 and 83 had never been admitted. Each of the provisions in Neutral Body No. 3 involves a concession by the conferences to earlier demands or objections which were made by petitioners at the hearing in reference to the proposed Neutral Bodies No. 1 and 2. Each of the amendments involved an issue upon which much evidence was adduced at the hearing and upon which all parties were heard. All parties were offered an opportunity on brief to sum up their positions and submit them for consideration by the Examiner. States Marine had more than ample notice of the terms of Neutral Body No. 3 and that it was subject to consideration in the proceeding. Strictly speaking, none of the various amendments of the conference or petitioners were evidence; they were proposals, arguments, or concessions which did not have to be labelled as evidence to be considered. Therefore, the Examiner was free to consider and approve these proposals. ^{8/}

^{8/} Petitioners cite Norris and Hirshberg v. SEC, 82 U.S. App. D.C. 32, 163 F.2d 689 (1947), cert. den. 333 U.S. 867 for the proposition that decisions must be supported by evidence in the record and not in briefs. That case involved a question of proper certification of the record by the Commission to the Court. Here, the findings, although they reflect the persuasion of briefs and the further refinements of self-policing set forth in Neutral Body No. 3, are based upon record evidence.

The situation here is much the same as that in Florida Economic Advisory Council v. Federal Power Commission, 102 U.S. App. D.C. 152, 251 F.2d 643 (1957), cert. den. 356 U.S. 959 (1958), where the Federal Power Commission granted a certificate of public convenience subject to certain curative conditions imposed after close of hearings. The petitioner claimed it would be adversely affected if not heard on these conditions. In rejecting the claim, this Court stated:

The conditions only resolved issues raised, argued and briefed in the hearing. They involved no surprises except insofar as they may have gone further or not so far as petitioner would have wished. 251 F.2d at 648.

C. The Neutral Body is Not Contrary to Section 15.

1. The Self-Policing Amendments Provide For the Selection of a Properly Qualified, Disinterested Firm to Act as Neutral Body.

a. The Background of the Neutrality Issue

Petitioners attack the neutral body agreements because of the Commission's alleged failure to provide for a strictly unbiased tribunal (Pet. Br. 31-40). The basis for the argument is found in the history of the protracted litigation by petitioners against one of the conferences, Trans-Pacific. In Docket No. 920, States Marine Lines, Inc. v. Trans-Pac. Freight Conf., 7 F.M.C. 204 (1962), aff'd. sub nom. Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n., 314 F. 2d 928 (9th Cir. 1963),

the Commission held that the conference agreement specifically required that the firm functioning as Neutral Body be in fact neutral. The Commission then found that the firm employed by the conference was not absolutely neutral and that actions taken by it against States Marine were not authorized by any approved section 15 agreement. The Court of Appeals affirmed. The Commission's decision and the opinion of the Court stand for the proposition that the neutral body must act strictly within the framework of an approved agreement. Neither decision required strict neutrality. Neither decision found that lack of neutrality per se worked any harm whatsoever on States Marine. The decisions simply hold that the neutral body failed to meet the qualifications imposed by the section 15 agreement, and that the activities taken by the disqualified neutral body were therefore void.

b. The Commission's Decision

The self-policing amendments as approved by the Commission (Neutral Body No. 3) provide that a firm may be employed to act as a neutral body if it meets certain specifications. Article 25(a)(2) provides in part:

Prior to such appointment a candidate will be required to divulge to the Conference any "professional or business relationships or financial interests" (hereafter in this Article simply "interests") which it may have with any of the members, their "employees, agents, subagents or their subsidiaries or affiliates" (hereafter in this Article simply "agents"). The candidate will also be required to agree, in the event of appointment, to divulge any future proposals it might receive to create such interests, and promise to obtain Conference approval thereof before accepting any such proposal. Such interests so divulged, if any, exclusive of financial interests, will not affect the qualification of the Neutral Body

when appointed by the Conference with knowledge thereof, and the members will not raise an objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint against a member with which it may have such an interest. (J.A. 283-84).

The provisions of the agreements to dispense with a requirement of complete neutrality were provisions of a far-sighted nature. Both the conferences and the Commission recognized the scarcity of qualified persons to act as the neutral body if every remote affiliation with a conference member acts as an absolute disqualification. The Commission and the conference members did recognize that an affiliation between an accused line and the neutral body would create a conflict of interest which could perhaps compromise the effectiveness of the neutral body. Such an affiliation results in disqualification. On the other hand, more remote affiliations were not considered to create any real problem. Consequently, because of the difficulty in obtaining qualified persons or firms to act as a neutral body, the conferences and the Commission considered it unwise to require absolute neutrality. In this respect, the Examiner stated:

In view of the fact that the Neutral Body functions are actually fact-finding rather than judicial; that the conclusive facts are usually, if not always, obtained from the books of account and records of the accused; that accounting firms are uniquely qualified both professionally and by procedural and ethical standards, to perform this work; that the conference rather than the accuser is the client; that fees are paid on the basis of time devoted to a case, and without regard to whether the complaint of malpractice is sustained or dismissed; that there is no evidence of actual bias or non-neutrality

relating to any of the firms heretofore used; and that the application of unduly broad exclusions will disqualify or bring about the disinterest of most, if not all, of the otherwise eligible accounting firms, thereby destroying this self-policing system, contrary to the public interest and to the detriment of commerce, it is found that a Neutral Body should not be disqualified because of a disclosed business relationship, i.e. independent contractor for professional or business services, with a conference member line other than the accused. (J.A. 363-64).

Consequently, the agreement as approved by the Commission provides for impartiality, not absolute neutrality.^{9/} At the present time, the firm acting as neutral body has no affiliation with any member line (J.A. 105).

c. Petitioners' Argument

Petitioners' argument is based upon their assumption that the neutral body must meet the qualifications of neutrality, no matter how remote, which are imposed upon a judicial tribunal (Pet. Br. 37-39). The assumption is inapposite.^{10/} The responsibilities of a neutral body charged with

^{9/} The Silver case did not require the type of judicial neutrality that is urged upon the Court by States Marine. 373 U.S. 241 (1963).

^{10/} Mr. Ralph S. Johns, Chairman of the Ethics Committee of the American Institute of Certified Public Accountants, testified that proposed Article 25 was not inconsistent or incompatible with the Code of Ethics of the Institute and that a member's affiliation with a complainant would not impair its independence. Johns pointed out by way of emphasis, that:

It is a common situation among the larger accounting firms to serve two or more competing enterprises and in my own personal experience in Chicago not only do we, as the same firm, serve the two largest farm implements corporations, but we serve them right out of the same office and we have done so for over 50 years. (J.A. 168-69).

policing the obligations of conference regulations in an international setting are not comparable to the duties of a court in the administration of justice. The neutral body is a device designed to limit malpractices which cannot be readily discovered or dealt with by normally constituted governmental authority. It is a means of combating malpractices which was designed by ocean carriers with the realities of the steamship business in mind. Indeed, each of the common carriers that voted in favor of the neutral body is a potential accused before the Neutral Body.^{11/} Nevertheless, each, in the interest of fair competition and in the interest of meeting the requirements of the Shipping Act, has surrendered certain sovereignty and accepted less than every conceivable procedural means of circumscribing the functions of the Neutral Body.

Petitioners, following their administration of criminal justice analogy, eulogize the standards of independence built into our judicial system. Yet, petitioners do no more than blindly assert that the same infinitely careful protections of the judicial process should be applicable here. We say they should not be. It is sufficient that a competent firm, acting impartially and with specialized skills, acts in accord with the criteria set forth in the conference agreement.

^{11/} Not only the amendments here were submitted to conference vote. The appointment of the Neutral Body is also subject to the affirmative vote of the membership under Article 19 of the basic agreement after the applicant has made full disclosure of pertinent professional affiliations. (J.A. 259-60).

2. The Self-Policing Amendments Provide an Accused the Opportunity to Defend Itself Against the Charges of the Neutral Body

a. The Silver Case and the Commission's Decision

Petitioners place heavy reliance on Silver v. New York Stock Exchange, 373 U.S. 341 (1963) (Pet. Br. 40-47). Silver involved a suit by a securities dealer against the New York Stock Exchange under the antitrust laws for the concerted refusal of the Exchange's members to continue private teletype and stock ticker service to the securities dealer (Silver), a non-member of the Exchange. The Exchange members had discontinued these services and refused to tell Silver the reason for the discontinuance, despite his numerous requests for information. The issue before the Court was whether the Exchange was liable under the antitrust laws or if the Exchange was to be impliedly immune therefrom by virtue of the self-regulating authority given the Exchange by the Securities Exchange Act of 1934 (15 U.S.C. 78 s(b)).

The Supreme Court decided that no exemption from antitrust liability could be implied in this case because, notwithstanding Silver's prompt and repeated requests, he was not informed of the charges underlying the decision to invoke the Exchange rules and was not afforded an appropriate opportunity to explain or refute the charges. The Court stated:

In acting without according petitioners these safeguards in response to their request, the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under the statute for what would otherwise be an antitrust violation. 373 U.S. at 365.

No justification can be offered for self-regulation conducted without provision for some method of telling a protesting non-member why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position. No policy reflected in the Securities Exchange Act is, to begin with, served by denial of notice and an opportunity for hearing. 373 U.S. at 361.

We submit that the Silver case is distinguishable from the instant case. Silver concerned a self-regulating action by the exchange against a person who was not a member of the exchange, whereas this case involves the approval of a system designed by the members of steamship conferences to police and assess damages against the members for misapplication of rates, rules, and regulations adopted by the members.

This is not to say that members who voluntarily choose a particular association are not entitled to fair treatment. We only suggest that a non-member, who has neither surrendered any sovereignty nor consented to be bound by the obligations of conference membership is more susceptible of becoming a victim of arbitrary action by an association, and that accordingly, greater care must be taken in such a case to insure against such arbitrary action.

Another distinction is that the Silver case involved a situation in which no notice and no opportunity to explain or rebut the final action of the exchange were given. The same situation is not contemplated here as the neutral body provisions approved by the Commission do afford an accused notice and an opportunity for hearing.

Petitioners contend that the Silver decision requires notice before investigation, identification of complainants, disclosure of all actual evidence whether or not confidential, cross-examination of anyone who has furnished information to the Neutral Body, and, finally, an appeal to arbitration.

We do not read Silver as requiring such elaborate safeguards. The only indication in Silver as to what type of notice and hearing should be afforded in a self-policing system is contained in the following language:

The basic nature of the rights which we hold to be required under the antitrust laws in the circumstances of today's decision is indicated by the fact that public agencies, labor unions, clubs, and other associations have, under various legal principles, all been required to afford notice, a hearing, and an opportunity to answer charges to one who is about to be denied a valuable right. 373 U.S. at 364 f.n. 17.

The procedural safeguards which the Court had in mind are not the same as those afforded a person accused of crime. As long as the rules of self-policing comport to the necessarily indefinite standard of fundamental fairness, the rules can be almost anything to which the members agree to be bound (J.A. 403).

b. The Evidence and the Law

(1) Generally

The purpose of the self-policing system is to provide the conferences with an efficient method of investigating and punishing breaches of the

conference agreement, tariff rates, rules, and regulations, and, most importantly, malpractices such as any direct or indirect favor, benefit, or rebate, granted by a conference member to any shipper, buyer, or consignee. Section 15 in express terms requires the policing of conference obligations.

The conferences involved here chose in 1958 to adopt the Neutral Body system of self-policing and found it to be an effective method of policing the obligations of their agreements. The Celler Committee^{12/} found a number of advantages in the Neutral Body system:

1. It provides an agency to which members can channel complaints of malpractice with the understanding that their identity will be kept confidential.
2. It can conduct or arrange for independent investigation of complaints involving conduct taking place in a number of foreign countries.
3. It has the psychological advantage of being a non-governmental independent agency.
4. Finally, while it affords machinery for quasi-judicial proceeding, it need not be bound by formal rules of evidence and procedure.

(2) Notice

The Neutral Body provisions which were approved by the Commission provide in Article 25(f)(3) (J.A. 256) that after investigation, the accused will be

^{12/} See Report on the Ocean Freight Industry of the Antitrust Subcommittee, Committee on the Judiciary, House of Representatives, 87th Cong. 2d Sess., 316 (1962).

advised as to whether or not there are reasonable grounds to believe that a violation of conference obligations occurred. If so, he will be informed of the nature of any alleged violation and of the evidence concerning it which can be revealed without revealing the identity of the complainant or of jeopardizing the confidentiality of the Neutral Body's source of information. If the actual evidence cannot be disclosed, the Neutral Body is to disclose enough of the substance of the evidence to enable an accused to prepare a defense to the Neutral Body's charges.

Petitioners suggest that these provisions do not guarantee that sufficient information will be imparted to allow an accused to prepare a meaningful defense (Pet. Br. 47-49). The wording of the agreement itself disputes this where, after guaranteeing disclosure of actual evidence whenever possible, the agreement recites "In all cases, however, the Neutral Body will inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fair play". In its Report, the Commission stated:

In those instances where evidence relied upon for decision should not be shown to the accused in its original form because of undesired disclosures, it would certainly be within the "basic precepts of fair play" for the Neutral Body to go as far as it reasonably can without disclosing the identity of complainants or sources of confidential information, to inform the accused of the substance thereof as material to an adequate understanding of the charges and findings. The substance of the evidence relied upon in reaching a finding that a breach has been committed must be disclosed to the accused in sufficient detail to give him an opportunity to show that it is untrue otherwise the elements of fundamental fairness are missing. (J.A. 407).

We submit that an accused will receive notice to the extent necessary to prepare an adequate defense.

Petitioners contend that an accused should have notice before investigation of any charges (Pet. Br. 48). The Commission was unwilling to permit advance notice of the subject of an investigation because it would facilitate the concealment of incriminating records and thus effectively frustrate the investigation (J.A. 404). . . Such advance notice is not necessary to procedural fairness. Notice subsequent to the investigation as described above gives ample opportunity to an accused to prepare a defense.

(3) Confrontation

The Neutral Body provisions approved by the Commission provide that the name of a complainant will not be revealed without permission, and, further, that no actual evidence will be revealed to an accused if such evidence will reveal the identity of the complainant ^{13/} (Art. 25(e)1), (f)(3) (JA 285-86). Such a requirement is necessary for the Neutral Body to effectively discharge its duties. Moreover, the Celler Committee recognized this to be ^{14/} a significant advantage of the Neutral Body system of self-policing. Common sense requires that the identity of an accuser remain secret; otherwise few complaints would be made, and the effectiveness of the Neutral Body would be impaired.

^{13/} It should be kept in mind, however, that an accused will be furnished a summary of any evidence withheld.

^{14/} See note 12 , supra.

Petitioners argue that non-disclosure of the identity of the complainant will not provide an accused with enough information to allow it adequate opportunity to defend (Pet. Br. 49), and, further, that there are many cases which require confrontation and cross-examination as an element of due process (Pet. Br. 50-51). We do not deny that cross-examination and confrontation have been required under certain circumstances as an element of due process. We submit, however, that they do not apply here. A Neutral Body hearing is not a criminal proceeding. Neither is it a proceeding in which governmental action might seriously injure an individual such as in Greene v. McElroy, 360 U.S. 474 (1959). In fact, much of the evidence would come from the accused's own records. A complaint, which gives the Neutral Body only an initial suspicion of a violation of the obligation of the conference obligation, would rarely be pertinent to the ultimate decision of the Neutral Body. Indeed, it is the function of the Neutral Body to begin with a confidential complaint and proceed to develop other non-confidential information to establish whether an accused has violated the obligations of a conference member. Cross-examination of a complainant would not test this subsequently developed information. It would serve only to expose and harass a conference member who suspects a violation of conference obligations.

We submit that neither the Silver case, the "due process" cases cited by petitioners,^{15/} nor the evidence of record compel a holding that an

^{15/} E.g., Tumey v. State of Ohio, 273 U.S. 510 (1927) and Gideon v. Wainwright, 372 U.S. 335 (1963).

accused be informed of the identity of the accuser or afforded an opportunity to cross-examine him.

(4) Investigation

The proposals regarding investigation which were approved in the Commission report provide the Neutral Body with authority to investigate written complaints, and in doing so, to inspect and copy "correspondence, records, documents, signed written statements or oral information and/or other materials" at the offices of the member lines (Article 25(d)), (J.A. 285, 407).

Petitioners seek to give an accused the option of requesting that its own auditors conduct the investigation of its financial records and accounts because of the hazard of exposing confidential business affairs (Pet. Br. 53). Petitioners contend that Mr. Waldroup, a partner in the present Neutral Body, testified that he had no objection to having the regular auditors' help under the Neutral Body's control and supervision (Pet. Br. 53). What Waldroup said was that he had no objection to the regular auditors being present during the investigation, but he emphasized that the Neutral Body would in no event relinquish control or direction of the investigation (J.A. 115).

We submit that use of the accused's own auditors to conduct the investigation could result in the concealment of incriminating evidence, inasmuch as the regular auditors might feel compelled to inform the accused line in advance that the investigation is to take place. Moreover, to require an auditor to investigate a line by which it is professionally employed would

place the auditor in a potentially embarrassing and disloyal situation which most auditors would prefer to avoid (J.A. 153, 155-56, 172).

In regard to petitioners' concern that the Neutral Body investigations would result in exposure of confidential business affairs, the Commission found on the record that there is no basis for predicting that the Neutral Body would make unwarranted and unauthorized disclosures of the business affairs of an accused. Therefore, the Commission permitted the Neutral Body to investigate at the office of the accused member (J.A. 407-08).

(5) Hearing

The Neutral Body provisions approved by the Commission provide for notice and disclosure of evidence and:

. . . within fifteen (15) days, or within such reasonable time thereafter . . ., if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explanations and/or rebutting evidence as it may deem proper and desirable. At such hearing the Neutral Body shall consider all of the available evidence . . . (Article 25(f)(3)). (J.A. 280).

Petitioners argue that these provisions do not assure an accused a fair hearing (Pet. Br. 54-56). This argument is based on petitioners' misconception that the conference amendments provide that an accused will not be informed of the evidence against him. The Commission has, however, guaranteed an accused this right as an element of fundamental fairness (J.A. 404, 408). As we have pointed out, supra, the conference amendments do provide a satisfactory method of informing an accused of the charges and the evidence.

(6). Summary

In summary, it is our position that to require the conferences to conform to the same standards of due process as required in a court of law, would frustrate the policy of section 15 which requires that conferences must adequately police the obligations of conference membership.^{16/} A principal purpose of a self-policing system is to provide speedy, relatively inexpensive, effective policing of practices which do not lend themselves to investigation by traditional judicial and administrative procedures. For a system to work adequately, it is absolutely essential that the self-policing agency be able to act with dispatch, unfettered by strict procedural niceties and, also, that it be authorized to make its determinations on the basis of evidence which, although persuasive to an expert self-policing agency, might not meet every formal requirement of a court in a criminal trial.

3. The Self-Policing Amendments Need Not Dictate Explicit Criteria Governing Amounts of Fines

Neutral Body No. 3 includes the following general provision under Article 25(f)(4): (J.A. 287).

Notwithstanding the difficulty in assessing such damages precisely, in determining the amount of liquidated damages to be assessed the Neutral Body shall consider such mitigating circumstances as it may deem relevant.

Petitioners, however, contend that very specific criteria should be set out in the agreement to prescribe the amount of fines (Pet. Br. 56-59).

^{16/} The Commission has discretion in effecting the policies under the Shipping Act, 1916. International Packers, Ltd. v. Federal Maritime Com'n, ___ U.S. App. D.C. ___; 356 F.2d 808 (1966).

As evidence that a Neutral Body should be circumscribed in such matters, petitioners point to the fines assessed against it and subsequently invalidated in Docket No. 920.^{17/}

The inclusion of the specific guidelines adds nothing which is not inherent in the conference proposal to consider "such mitigating circumstances as it may deem relevant" (Article 25(f)(4)). Each of the guidelines suggested by petitioners is taken into consideration whenever it is relevant. In fact, the Examiner found that testimony shows that the Neutral Body customarily considers the particular mitigating considerations material to each case (J.A. 258). Consequently, the Commission did not err in holding that there is no evident basis for anticipating that the Neutral Body will not exercise fundamental fairness in determining and considering such mitigating circumstances as may be reasonably determinable and relevant in each case (J.A. 409).

4. The Right to Appeal the Decision of the Neutral Body is Unnecessary and Unwarranted

None of the three self-policing amendments make provision for appeal. Article 25(g), approved by the Commission, states that "the members agree

^{17/} States Marine Lines, Inc. v. Trans-Pac. Freight Conf., 7 F.M.C. 204 (1962) aff'd sub nom. Trans-Pacific Freight Conference of Japan v. Federal Maritime Com'n, 314 F.2d 928 (9th Cir.). In each instance, the then Neutral Body assessed the maximum fine. The Commission, however, invalidated the fines, not because the amounts were unreasonable, but because the appointment of the Neutral Body itself was not in conformity with the conference's basic agreement. Furthermore, the offense involved was the refusal to allow the Neutral Body access to company records. Such refusal is a serious offense as it completely frustrates the Neutral Body's discharge of its duties.

to accept the decisions of the Neutral Body as valid, conclusive, and unimpeachable". (J.A. 288). Petitioners argue that since the Neutral Body provisions contain no provision for appeal, they are deficient inasmuch as experience shows that some type of appeal provision is necessary to prevent "run-away decisions" (Pet. Br. 59-62).

Appeal is a matter of grace; it is not essential to due process of law,^{18/} and the Commission found that appeal would render the self-policing system ineffective (J.A. 412). Petitioners overlook the fact that Congress, in providing for conference self-policing, sought to encourage a system whereby the conferences could police malpractices in an adequate manner without resorting to the more formalized and restrictive procedures of the type proposed by petitioners. Petitioners equate speedy, efficient policing with unfairness. This is an unwarranted assumption. It is also true, as the Commission found, that appeal could result in the disclosure of the identity of the complainant (J.A. 412). Non-disclosure is essential if there is to be any kind of workable self-policing system.

Petitioners' concern that "run-away decisions" will result if there is no provision for appeal is unfounded. They refer to their experience with the original neutral body whereby they were fined the maximum amount

^{18/} See French v. War Contracts Adjustment Board, 182 F.2d 560, 565 (9 Cir. 1950); Luckenbach Steamship Co. v. United States, 272 U.S. 533, 536 (1926).

for each of three successive occasions on which they refused access to their records to the Neutral Body (Pet. Br. 16). These fines have never been determined to have been unreasonable in relation to the offenses and, therefore, cannot be classified as run-away decisions. Further, these same fines were later set aside by the Commission in Docket No. 920, not because they were unreasonable, but because the Neutral Body was not qualified to act.^{19/} More importantly, this same case serves as an example that Neutral Body decisions can be reviewed by the Commission in instances where the Neutral Body has acted outside the terms of the approved agreement. The terms of the Neutral Body No. 3 agreement set up sufficient standards to govern the action of the Neutral Body and to guarantee that it does not act arbitrarily or unfairly. Should the Neutral Body transgress these standards, an aggrieved party will have recourse to the Commission.^{20/}

Such is not the case, as the Commission has the power to maintain continual surveillance over actual self-regulation operations of the Neutral Body pursuant to an approved agreement; and should such surveillance disclose operations in violation of the Shipping Act, approval of the agreement can be withdrawn.

^{19/} See note 17 , supra.

^{20/} The discussion in Silver concerning the need for some kind of review was in reference to whether or not an antitrust action would lie in that case. The court there found that the threat of an antitrust action would act as a check on anticompetitive practices of the kind which occurred in Silver. Such a check was deemed necessary because the Securities Exchange Commission had no power to review the New York Stock Exchange's exercises of self-regulation. 373 U.S. 341 at 359-60.

IV. CONCLUSION

For the foregoing reasons, the Commission's order approving Agreement No. 150-21 as modified by No. 150-29, and Agreement No. 3103-17 as modified by No. 3102-26, pursuant to section 15 of the Shipping Act, 1916, should be affirmed.

Respectfully submitted,

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Federal Maritime Commission

September 19, 1966
Washington, D. C.

BRIEF FOR RESPONDENT UNITED STATES OF AMERICA

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20134

STATES MARINE LINES, INC.,
GLOBAL BULK TRANSPORT CORPORATION,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDER OF
THE FEDERAL MARITIME COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 10 1966

Nathan J. Paulson
CLERK

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STATEMENT OF QUESTIONS PRESENTED

The questions presented are correctly stated in the brief of respondent Federal Maritime Commission.

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TABLE OF AUTHORITIES

CASES

Greene v. McElroy, 360 U.S. 474

Ohio ex rel Bryant v. Akron Metropolitan Park District,
281 U.S. 74, at 80

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Trans-Pacific Freight Conference of Japan v. Federal Maritime
Commission, 314 F. 2d 928 (C.A. 9)

OTHER AUTHORITIES

Section 4 of the Administrative Order Review Act of 1950,
5 U.S.C. 1034

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended,
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House Report No. 498, 87th Congress, 1st Sess. 10

House Report No. 1419 (Report on the Ocean Freight Industry)
87th Cong., 2d Sess. 315

COUNTER-STATEMENT OF THE CASE

A. Introduction

This brief is submitted on behalf of the United States, which is a statutory respondent pursuant to Section 4 of the Administrative Order Review Act of 1950, 5 U.S.C. 1034. The Federal Maritime Commission, the agency out of whose proceeding this appeal arises, has filed a separate brief on its own behalf.

The Commission has approved for each of two conferences a self-policing system by which each conference is to enforce agreements among its members. A conference is a group of carriers formed to make agreements concerning rates and other terms and conditions for ocean transport. Under the Shipping Act, these agreements when approved by the Commission are exempt from the antitrust laws.

The petitioners, which operate jointly as a member of each conference, have raised several objections to the policing system approved by the Commission, one of which is that the system is fundamentally unfair within the meaning of Silver v. New York Stock Exchange, 373 U.S. 341. For the reasons stated below, we believe that the system is, in some respects, fundamentally unfair and therefore should not have been approved. We point out below that the system, somewhat modified, can be effective without being unfair. As to the other issues in the case, we concur in the Commission's position.

B. Facts

This case arises out of Commission Docket No. 1095, in which the Federal Maritime Commission pursuant to §15 of the Shipping Act of 1916, as amended, approved by a 3-2 vote a self-policing agreement. Petitioners opposed agreements as submitted by each of two conferences and as approved by the Commission. The conferences are intervenors in this proceeding.

The system approved by the Commission is a version of the so-called "neutral body" system which has been used by these conferences in the past. In a nutshell, this system provides for the selection of a "neutral body" to enforce the agreements between the conference carriers. The neutral body in this version must be "an impartial, independent person, firm or organization" (J.A. 409). Although it may not have a financial interest in any member line, it may have a professional relationship with any member. In other words, if the neutral body is an accounting firm, as it has been and is likely to be, it is not disqualified from serving merely because a member line happens to be one of its clients. Such a business relationship would be disqualifying only whenever the client is accused of a violation, but it would not be disqualifying when the client is the complainant.

Upon complaint by a member or on its own motion, the neutral body may inspect the records of any member without warning. After a preliminary investigation, it must inform the accused member of the nature of the charges against it "in sufficient detail to give [it] an opportunity to show that [the charge] is untrue" (J. A. 407). The

neutral body may not, however, without the complainant's permission, disclose to the accused the complainant's identity or any evidence tending to reveal that identity.

After a hearing, the neutral body determines whether there has been a violation, and, if so, after considering any mitigating circumstances, it may fine the member up to \$10,000 for the first offense, \$15,000 for the second, \$20,000 for the third, and \$30,000 for the fourth and each succeeding offense. There is no appeal from the determination either of guilt or of the amount of fine.

SUMMARY OF ARGUMENT

The self-policing system approved by the Commission is fundamentally unfair. It would permit the neutral body, acting as the sole and final authority, to impose harsh penalties on a member line at least in part on the basis of secret evidence which may have been obtained from a competing member line. This unfairness is compounded by the fact that the competing line, whose identity would be undisclosed, might be a client of the accounting firm serving as the neutral body.

The unfairness in the system may be eliminated, however, without rendering it ineffective by the addition of a panel of arbiters, as more fully explained hereinafter.

ARGUMENT

The self-policing system approved by the Commission is fundamentally unfair and is unnecessarily so.

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, was amended in 1961 (75 Stat. 764) to require the Commission to disapprove "any * * * agreement [subject to approval under § 15] * * * on a finding of inadequate policing of the obligations under it * * *." The House Committee which reported out the proposed amendment, explained that "Under the Shipping Act of 1916, it was contemplated that a conference itself would serve as a system of self-policing that would make effective its agreements among the member lines under supervision of the Federal Maritime Board * * *." H. Rep. No. 498, 87th Cong., 1st Sess. 10. The Committee pointed out, however, that

the self-policing systems in use by the conferences were ineffective and the supervision by the Federal Maritime Board was considerably less than sufficient to insure observance of conference agreements and of U. S. law. Accordingly, the bill contains a provision requiring the inclusion of effective policing provisions in the conference agreement and requires the conference to exercise such policing power effectively on penalty of subsequent disapproval of the agreement. Ibid. 1/

There is thus no question that Congress sought to have self-policing systems which are effective.

1/ The technique of curbing malpractices in the industry through industry self-policing was considered desirable in part because of "hindrances raised by the international scope of the industry, such as the relative inaccessibility of the records of foreign-flag lines and their unwillingness to cooperate with what is to them a foreign governmental agency." H. Rep. No. 1419 (Report on the Ocean Freight Industry) 87 Cong., 2d Sess. 315-316.

On the other hand, there is nothing in the legislative history to suggest that such systems must be effective at any price, i.e., regardless of how unfair they may be. Indeed, Section 15 requires the Commission to disapprove any agreement found to be "unjustly discriminatory or unfair as between carriers * * *, or to be contrary to the public interest * * *." In Silver v. New York Stock Exchange, 373 U.S. 341, involving a stock exchange self-policing system, the Supreme Court announced the principle that any such system which is fundamentally unfair does not serve the purposes of the regulatory statute and therefore could not have been intended to be exempt from the antitrust laws. As a matter of fact, all parties to this proceeding agree that the Commission may not approve a system which is fundamentally unfair.

The principal issue in this case is, then, whether the system approved by the Commission is fundamentally unfair. We contend that it is unfair and believe that modification is feasible that would eliminate the unfairness without rendering the system ineffective.

The system's potential for unfairness becomes apparent upon consideration of the cumulative effect of certain of its aspects: (1) the neutral body is not disqualified even if a client is the undisclosed complainant; (2) it need not disclose evidence tending to reveal the identity of the complainant; and (3) the decision of the neutral body is subject to no review. These provisions make it possible for the neutral body, acting as the sole and final authority,

to convict and fine a member line at least in part on the basis of secret evidence obtained from a client whose identity is undisclosed and who may be a competitor of the accused line.

Permitting the neutral body to consider secret evidence in determining the guilt or innocence of a member is itself highly questionable:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. [Greene v. McElroy, 360 U.S. 474, 496].

The attempt to distinguish Greene on the ground that it involved "governmental action" whereas the case here involves regulation by a "private voluntary association" (Report, p. 12) is not persuasive. Whether or not the Commission's approval of the self-policing system does amount to governmental action, Greene is relevant here. It supports the principle that it is unfair to use secret evidence as a basis for imposing harsh penalties. The penalties in Greene and here are severe: Loss of employment in Greene; here, a series of fines which "could easily put it [a member line] in the hands of a receiver." Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission, 314 F. 2d 928, 934 (C.A. 9). Moreover, the use of secret evidence is not the only weakness in the system.

The possibility that the source of the secret evidence will be the neutral body's client makes the system doubly suspect. For the complainant is likely to be a competitor of the accused line who has lost business to that line allegedly because of the latter's failure to abide by the conference agreement. Since the role of the neutral body would be to determine whether these allegations are correct, a professional relationship with either the complainant or the accused is plainly improper.

The Commission itself sanctions the disqualification of the neutral body when the professional relationship is with an accused line. Yet it would allow such relationship to exist when the relationship is with a complainant because the high professional standards of the accounting profession, in the Commission's view, would eliminate any chance of bias (J.A. 410-411). The Commission, however, gives no basis for distinguishing between the two situations--when the relationship is with the accused line, on the one hand, and when it is with the complainant, on the other. Furthermore, the high standards notwithstanding, the neutral body is disqualified when the professional relationship is with an accused line even though this relationship would be fully disclosed. If a professional relationship is disqualifying when fully disclosed, a fortiori, it should be disqualifying when not disclosed, as it would not be when the relationship is with the complainant.

Finally, the system contains no provision for review to guard against any abuses which might result from the possible use of secret evidence and potential bias. The neutral body is the sole and final authority.

The self-policing system as approved is not only a sharp departure from acceptable standard of fairness but is unnecessarily so. It is clear from the Commission's report that the conferences can modify the system to make it fair while yet preserving its effectiveness.

One means of eliminating the unfairness of the system is to permit an accused member to appeal an adverse decision by the neutral body to a panel of arbiters free from any business relationship with any member line. Under such a system, the neutral body would have to demonstrate the member's guilt to the panel of arbiters by using only evidence which can be revealed without disclosing the complainant's identity. This would help eliminate the danger of improper conviction on the basis of secret evidence because under this proposal the panel of arbiters could never have such evidence before it. Furthermore, since the role of the neutral body would be changed from "judge" to "prosecutor" whenever an accused member chose to appeal to the panel, the potential harm of permitting an undisclosed professional relationship between the neutral body and the complaining member would, in our judgment, be minimized sufficiently for the system to meet the standard

of fundamental fairness, especially in view of the admittedly high professional standards of the prospective neutral bodies. 2/

There seem to be two basic requirements for the effectiveness of the neutral body system: the right of the complainant to remain anonymous so he can complain without fear of alienating shippers favored by the member violating an agreement, and the right of the neutral body to inspect a member's files without warning so the member will not have time to conceal incriminating evidence. These requirements would not be inconsistent with a system, such as that just proposed, which permits an accused line to appeal. For, the existence of a panel of arbiters would not affect in any way the right of the neutral body to inspect a member's files without warning. Nor, as the Commission mistakenly assumed (J.A. 412), would it necessarily result in the disclosure of a complainant's identity because, as indicated above, the neutral body would be required to present to the panel only evidence which could be revealed without disclosing the complainant's identity. The inability of the panel to consider secret evidence would not render the system ineffective generally because such evidence--while capable of unduly influencing the neutral body in a particular case--would rarely be vital. For,

2/ It would, of course, be preferable for the neutral body to be absolutely free from any possible taint of bias even in a system which provides for a panel of arbiters. The Commission has found, however, that a neutral body which is free of any professional relationship and is otherwise qualified may not always be available (J.A. 411). To proscribe such a relationship, therefore, might render ineffective a system which we believe otherwise meets the standard of fundamental fairness.

as the Commission found, in the context of permitting the neutral body to have a business relationship with a member line, "the conclusive facts are usually, if not always, obtained from the books of accounts and records of the accused" (J.A. 410).

The Commission rejected the petitioner's proposal for a board of arbiters, a proposal seconded by the hearing counsel (J.A. 411) on the basis of cases holding that appeal is a matter of grace not of right. That line of cases, however, assumes that there has been at least one regular hearing. As the Supreme Court said in Ohio ex rel, Bryant v. Akron Metropolitan Park District, 281 U.S. 74, at 80, "the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." (Emphasis ours.) Here, there is no assurance of fairness before the first tribunal, i.e., before the neutral body, which might have a professional relationship with a complainant supplying secret evidence.

It is true that the Commission also made findings that permitting appeal would render the system ineffective (J.A. 412), chiefly, it seems, on the mistaken notion that appeal would necessarily mean disclosure of the complainant's identity. The other drawbacks to permitting appeal are not fatal. The Commission suggests that the neutral body would be "better qualified" than a panel, but the only qualification really necessary to the panel would be the ability to understand a presentation by the neutral body. The Commission also found that

some of the most likely candidates for the position of neutral body have indicated their unwillingness to serve if their decisions were subject to appeal (J.A. 412), but surely the resources of the conferences are such that they could overcome the objections of enough of these candidates for the system to function. The Commission also found that appeal would cause delays, but excessive delays could be avoided with appropriate rules.

CONCLUSION

For the above stated reasons, the order of the Commission should be set aside and the case remanded to the Commission for further proceedings.

Respectfully submitted,

DONALD F. TURNER,
Assistant Attorney General,

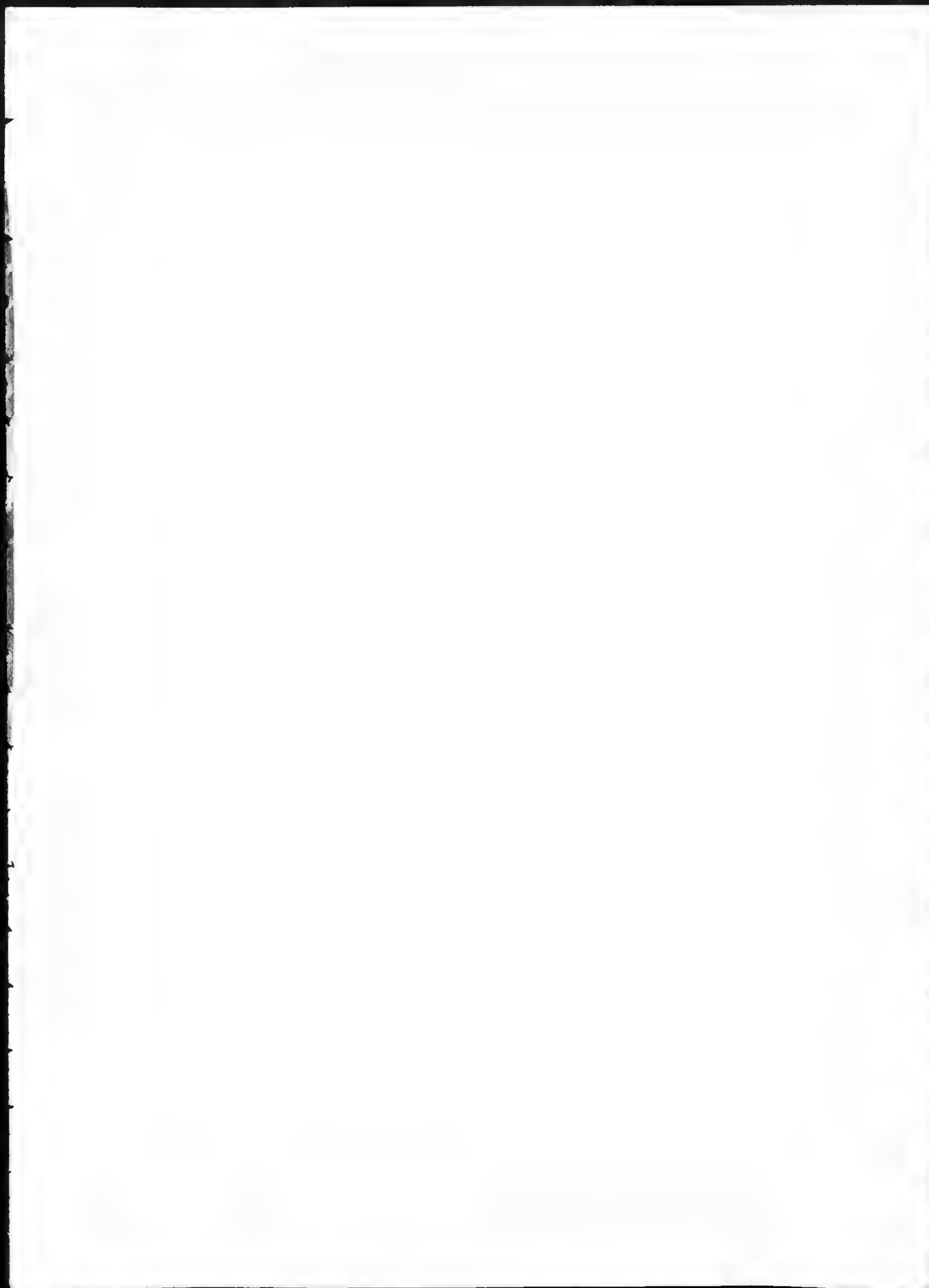
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October 10, 1966
Washington, D. C.



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 20,134

FILED APR 14 1967

Nathan J. Paulson
CLERK

STATES MARINE LINES, INC.,
GLOBAL BULK TRANSPORT CORPORATION,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

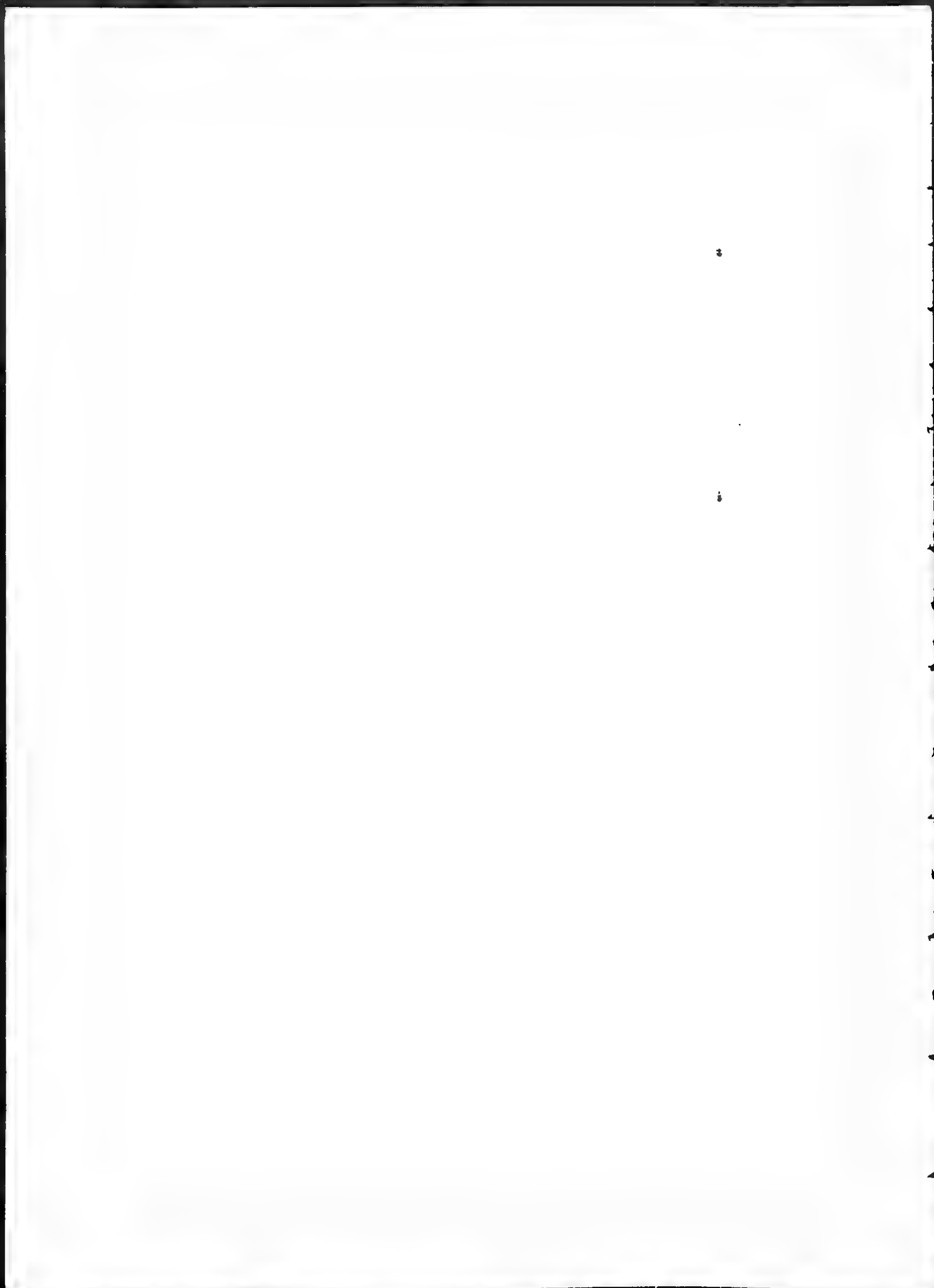
TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN,
JAPAN-ATLANTIC & GULF FREIGHT CONFERENCE,
AND THE MEMBER LINES THEREOF,

Intervenors.

PETITION FOR CLARIFICATION

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Dated: March 30, 1967



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATES MARINE LINES, INC.,
GLOBAL BULK TRANSPORT CORPORATION,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN, JAPAN-ATLANTIC & GULF
FREIGHT CONFERENCE, AND THE
MEMBER LINES THEREOF,

Intervenors.

No. 20,134

PETITION FOR CLARIFICATION

1. Intervenors Trans-Pacific Freight Conference of Japan and Japan-Atlantic and Gulf Freight Conference, and their Member Lines, hereby request the Court to clarify its opinion of March 8, 1967, in respect to the form of internal review the Court considered would not offend Section 15 of the Shipping Act, 1916, as amended.^{1/}

In view of the already protracted nature of this litigation, which, the Court itself noted,^{2/} intervenors believe

^{1/} 39 Stat. 733 (1916), as amended, 46 U.S.C. §814 (1964).

^{2/} At p. 5.

the requested clarification would serve to avert a further legal attack upon their self-policing system.

2. In its opinion of March 8, 1967, the Court held, in relevant part:

We hold, therefore, that given the special characteristics of the shipping industry and the conference system, the broad discretion granted a Neutral Body must be subject to some form of continuing internal review. That review must provide reasonable assurance that a member will be penalized only on the basis of evidence it has an adequate opportunity to rebut or explain--in other words, that the accused will in fact be treated fairly. (Emphasis added.) (P. 23.)

3. Intervenor's understand this language to mean, if they should adopt by conference vote an appeal provision which gives the accused reasonable assurance it has been assessed damages "only on the basis of evidence it has [had] an adequate opportunity to rebut or explain," their self-policing system would not then be unfair on its face as to violate Section 15 of the Shipping Act, 1916, as amended.^{3/} In other words, intervenors view the Court's decision as requiring an independent check to ascertain

^{3/} The Court stated the test thusly: "While we agree with the general proposition that courts should not engage in undue speculation as to how procedures are likely to be carried out in practice, cf. Fahey v. Mallonee, 332 U.S. 245, 256 (1947), that does not mean a court should stay its hand where unfairness is obvious." (Emphasis added.) (P. 10, Note 11.)

whether the Neutral Body, in reaching its determination, relied upon evidence which the accused (1) was permitted to inspect, and (2) was given an adequate opportunity to rebut or explain. Such a check would eliminate the possibility of the Neutral Body's acting on secret evidence as it would repose in an outside panel final authority to insure that the evidence relied upon was disclosed and that the accused was given an adequate opportunity to explain or rebut it, including evidence which may have been supplied by a complainant who is a client^{4/} of the Neutral Body.

4. With the added protection of a check against the use of secret evidence, and against the failure to give the accused an adequate opportunity to explain or refute such evidence, the Neutral Body's high professional standards would be reinforced, and there would be no substantial possibility of abuse working against the accused who must have seen and tested all the evidence relied upon. Thus, in the words of the Court, "[P]roviding an independent check of the disclosed evidence would largely neutralize

^{4/} The Court rejected States Marine's contention that the objective standard of neutrality applies to the private or semiprivate sector, and sanctioned disclosed and conference-approved professional relationships, given some internal check. (P. 12.)

any substantial abuse of discretion . . . and this, we think is all that can be reasonably asked." (Emphasis added.) (P. 20.)

5. To read the decision as requiring more would go farther than is reasonably necessary to protect the accused, would involve the substitution of the judgment of arbiters for that of the Neutral Body in which all the members (save States Marine) have reposed the highest confidence, and would undermine the Commission's expert findings respecting the need for such qualified firms to cope with the technically complex subject of investigating and determining malpractices, considerations which the Court said it could not "lightly dismiss." (P. 12, 13.) Hence, the check which the Court appears to have required would be neither (1) a review to determine whether the Neutral Body resorting to rules of common sense under Article 25 (f) (2), could reasonably have been persuaded on the evidence a breach had occurred,^{5/} nor, (2) a de novo review on the

^{5/} Such a review would be of the type appellate courts perform in reviewing "governmental action" by administrative agencies; thus, the procedural guarantees enjoyed when the powers of the government are arrayed against the accused would seem not to control in the Neutral Body context (P. 8), given a check of the disclosed evidence.

merits,^{6/} the Court's purpose being to protect against the possibility of an "improper conviction on the basis of secret evidence" and "non-disclosable information."^{7/}

WHEREFORE, THE COURT IS REQUESTED TO CLARIFY THAT
WHEN IT HELD:

That review must provide reasonable assurance that a member will be penalized only on the basis of evidence it has an adequate opportunity to rebut or explain--in other words, that the accused will in fact be treated fairly,

it thereby indicated a form of review, which, if adopted by intervenors, would cure the critical defect in the system which the Court said is "the one demanding a remedy."

(Emphasis added.) (Pp. 19, 20, Note 23.)

Respectfully submitted,

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Attorneys for Intervenor

Dated: March 30, 1967

^{6/} A de novo review would be equivalent to according the accused two trials, thus placing even greater limitations on what the Court correctly said conferences can hope to "realistically achieve" in policing an international industry (p. 3). Such an unnecessary and drastic change in the system, where original determinations are made and damages are fixed at the appellate level, would completely dislocate the decision-making responsibility, undermining the lines' faith in the appointee they selected for its special qualifications, just as a de novo court review would defeat and undermine the purpose of administrative tribunals.

^{7/} At pp. 19, 20.

CERTIFICATE OF SERVICE

I, Charles F. Warren, one of intervenors' attorneys herein, and a member of the bar of this Court, hereby certify that the foregoing petition is presented in good faith and not for delay.

I hereby further certify that copies of the said petition were served this day by mailing, First-Class, Postage Prepaid, upon the following attorneys of record:

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